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No. ——

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CITY OF YONKERS,

Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether a municipality may be severely sanctioned for civil contempt for failure to enact legislation when individual councilmembers refuse to comply with the court's decree and the municipality has no authority to purge itself of contempt by enacting legislation or by coercing its council to enact legislation.

2. Whether the Excessive Fines Clause of the Eighth Amendment prohibits the imposition of "bankrupting fines" as a civil contempt sanction against a party that is unable to purge itself of contempt.

LIST OF PARTIES

In addition to the parties listed in the caption, the parties to the proceeding in the courts below included the Yonkers Branch—National Association for the Advancement of Colored People as Plaintiff-Intervenor, the Yonkers Board of Education and the Yonkers Community Development Agency. The parties to the contempt proceeding included Henry Spallone, Peter Chema, Nicholas Longo and Edward Fagan.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The City of Yonkers hereby petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a) is reported at 856 F.2d 444. The order of the district court outlining the sanctions imposed on petitioner is not reported. App., *infra*, 60a. The order of the district court finding petitioner in contempt and imposing sanctions also is not reported. App., *infra*, 65a.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Eighth Amendment to the United States Constitution provides, in relevant part, that:

> Excessive bail shall not be required, nor excessive fines imposed . . . .

U.S. Const. amend. VIII.

STATEMENT

1. This action was instituted by the United States against the City of Yonkers (the "City"), the Yonkers Community Development Agency and the Yonkers Board of Education (the "Board") in the United States District Court for the Southern District of New York on December 1, 1980. The complaint, which alleged violations of the Fourteenth Amendment to the United States Constitution, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3604(a), Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000c-6, sought injunctions requiring the Board to implement a system-wide plan of desegregation and requiring the City and the Community Development Agency to adopt a housing remedy plan locating public and subsidized housing throughout the City of Yonkers. The Yonkers Branch—National Association for the Advancement of Colored People, *et al.*, was permitted to intervene as a party plaintiff. See *City of Yonkers* v. *United States*, Petition for Certiorari, No. 87-1686, at 2 (hereinafter "*Yonkers I*").[1]

On November 20, 1985, the district court issued a liability opinion (*Yonkers I* App., 125) finding that the

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[1] The petition for a writ of certiorari in No. 87-1686, raising, *inter alia*, the issue of the City's liability for intentional discrimination based on its placement of public housing, was denied by this Court. 108 S.Ct. 2821 (1988). All citations to "*Yonkers I*" refer to the briefs and appendix in that petition for certiorari.

City had violated the Equal Protection Clause of the Fourteenth Amendment and the Fair Housing Act in its selection of sites for public and subsidized housing and that the City had violated the Equal Protection Clause by its role in perpetuating and exacerbating racial segregation in the Yonkers public schools.[2] Following its finding of liability, the court issued a series of remedial orders, including a requirement that 200 units of public housing be built on the east side of Yonkers. See *Yonkers I* App., 755. On December 28, 1987, the United States Court of Appeals for the Second Circuit unanimously affirmed the judgment of the district court "in all respects." *Yonkers I* App., 122. This Court denied the City's petition for a writ of certiorari on June 13, 1988. 108 S.Ct. 2821 (1988).

2. On January 27, 1988, the Yonkers City Council approved a remedial consent decree setting forth the actions that the City would take "in connection with [the] consensual implementation" of the district court's Housing Remedy Order. See App., *infra*, 33a (First Remedial Consent Decree). With respect to the City's obligation to build 200 units of public housing in eastern Yonkers, the consent decree renewed the City's commitment to build the units, identified seven sites for construction and set a timetable for specific steps to be taken toward construction. *Id.*

In addition, the consent decree acknowledged that a long-term plan for the private development of 800 units of assisted housing was "an appropriate target." App., *infra*, 37a. In furtherance of this goal, the City agreed to adopt certain legislation requiring 20 percent of all

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[2] The district court further found that the City and the Board had violated Title IV of the Civil Rights Act and the Equal Protection Clause by maintaining and operating a segregated school district.

new multi-family housing to be set aside for low- and middle-income families and to include in the legislation incentives, such as zoning changes, variances, special exemptions and tax abatements, necessary to attract private housing investment. App., *infra*, 39a.

On June 13, 1988, after the parties had failed to reach agreement on the specific elements of a long-term plan, the Court entered an order, which set forth detailed provisions for the development of an assisted housing plan. See app., *infra*, 43a (Long Term Plan Order). One week later, the district court directed the City to adopt a resolution implementing the provisions of the Long Term Plan Order. When the City failed to do so, the district court on June 29, 1988, entered an order directing the plaintiffs to submit a draft order that would require the City to take "specific implementing action pursuant to a prescribed timetable, on penalty of a finding of contempt and the imposition of bankrupting fines." App., *infra*, 59a. At the July 12 hearing on the proposed order drafted by the NAACP and the United States, the City urged the court not to force a confrontation with the City but instead simply to enter an order deeming the necessary legislation to have been adopted by the Council on behalf of the City. The district court, however, refused to do this. Instead, the court proposed the creation of an independent "Yonker's Affordable Housing Commission" to exercise all of the City's authority with respect to implementation of the housing remedy order.

At the district court hearing on the proposal to create the Affordable Housing Commission, the NAACP supported the proposal, but the United States objected, arguing that the City should be directed to adopt implementing legislation immediately or to show cause why it should not be held in contempt. The City again urged the district court not to punish the City and to move forward by utilizing its own remedial authority to im-

plement the Long Term Plan Order directly. The court, however, adopted the recommendation of the United States and immediately incorporated it into an order. The order provided that the City had until August 1, 1988 to take action to enact "the legislative package relating to the long-term plan as described in [the consent decree] and the Long-Term Plan Order." App., *infra*, 61a. Failure to do so would require the City and the individual members of the City Council to appear the next day (August 2) and show cause why they should not be held in contempt of court.[3]

On August 1, 1988, the City Council by a 4-3 vote defeated the resolution of intent that would have set in motion the process of adopting, under New York law, the zoning legislation necessary to implement the court's Long Term Plan Order. The next day the City and the four members of the City Council who voted against the resolution were adjudicated in civil contempt by the district court.[4] As outlined in its July 26, 1988 order, the court imposed on the City a fine of $100 per day, which would be doubled each day until the City complied with the court's order to enact legislation. Under the terms of that order, the City would be subject to cumulative fines that reached $10,000 by day 7, $1 million by day 14, $200 million by day 21 and $26 billion by day 28. Pursuant to this schedule, the City's annual budget would be exceeded by day 22. The court also

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[3] The City Council is the City of Yonkers' sole governing authority. The Council consists of seven members, six of whom are elected to represent specific districts and the mayor, who is elected on an at-large basis. The City Manager serves at the pleasure of the Council. App., *infra*, 27a. Other administrative and executive officials of the City serve at the pleasure of the City Manager or in accordance with state civil service requirements.

[4] One councilmember who had voted against the resolution was not represented by counsel at the August 2 hearing. He was allowed a continuance to obtain counsel and was adjudged in contempt on August 4, 1988 and fined retroactively to August 2.

imposed a fine of $500 per day against each member of the City Council who had voted against the resolution and ordered each councilmember who did not vote in favor of the legislation within 10 days to be jailed.

The City argued that the sanctions against the City—in addition to the sanctions against the individual councilmembers—were both punitive and unnecessary. The district court, however, rejected the City's contention that imposition of the fines in question would be devastating to the City's residents, who would be deprived of all municipal services within a matter of days, and completely unnecessary to the implementation of the court's orders. The court also rejected the City's contention that the City itself (and its citizens) should not be punished because the City, as a municipal corporation, was powerless to act, except through the City Council, and therefore had no means available to it to purge itself of contempt so long as individual councilmembers continued to disobey the court order.

3. On August 9, 1988, the United States Court of Appeals for the Second Circuit granted a stay of the sanctions against the City and individual councilmembers pending expedited appeal of the contempt sanctions. On August 26, 1988, the court of appeals affirmed the district court's order with respect to the individual councilmembers and affirmed, with one modification, the order with respect to the City. The court first held that the district court did not abuse its discretion in proceeding with contempt sanctions, rather than simply using its authority either to adopt the necessary ordinances or to establish the Affordable Housing Commission. App., *infra*, 20a. The Second Circuit also held that the district court did not err or abuse its discretion in choosing to impose a contempt sanction against the City as well as the City Council. The court stated that "[f]or purposes of taking official governmental action, the City of Yonkers is the City Council and vice versa." *Id.* at 27a. Thus, "the

City, along with the defiant council members, may be subject to civil contempt sanctions." *Id.*

Finally, the court of appeals also rejected the City's contention that the amount of the fines imposed was excessive and a violation of the Due Process Clause of the Fifth Amendment and the Excessive Fines Clause of the Eighth Amendment. According to the court, "[e]ven if the Excessive Fines Clause should be determined to apply to punitive damages, it does not apply to civil contempt sanctions imposed to obtain compliance with court orders." App., *infra*, 29a. Rather, the Clause applies only to "sanctions imposed to punish past conduct, not to sanctions imposed to secure prospective compliance." *Id.* at 29a-30a.

Nevertheless, the court of appeals conceded that, "[a]t some point . . . the doubling [of the fine on a daily basis] reaches unreasonable proportions." App., *infra*, 31a. The court thus found that "the doubling exceeds the bounds of the District Court's discretion when the level of each day's fine exceeds $1 million." *Id.* Accordingly, the court affirmed the district court's order in its entirety, except for a modification providing that "the fine shall be $1 million per day on day 15 and $1 million per day for every subsequent day of noncompliance." *Id.*

On September 1, 1988, this Court granted the applications of the four individual councilmembers for a stay of the contempt citations against them pending timely filing and disposition of a petition for a writ of certiorari. The application of the City for a similar stay was denied. 57 U.S.L.W. 3183.[5]

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[5] On September 9, the councilmembers, by a 5 to 2 margin, voted to purge the City of contempt by adopting the affordable housing ordinance. The original August 2 order adjudicating the City in contempt provides that any resumption of the contumacious conduct will result in renewed fines "at the level at which the fines had previously ceased"—$1 million per day. App., *infra*, 67a. On

REASONS FOR GRANTING THE PETITION

This case raises two important and interrelated questions of law, *viz.*, (1) whether the City, as a municipal corporation, may be severely sanctioned for civil contempt in a situation in which the City has no authority to purge itself of the contempt or to coerce members of the City Council to purge the City of contempt; and (2) whether the Excessive Fines Clause of the Eighth Amendment precludes a contempt sanction consisting of "bankrupting fines" of up to one million dollars per day. Moreover, the issues raised by the City in this petition are inextricably intertwined with the issues raised by the individual members of the City Council in their petitions for a writ of certiorari. Thus, at the very least, if this Court grants the petitions of the individual City councilmembers, it also should grant the City's petition.

By granting certiorari to the individual councilmembers and not to the City, this Court inadvertently might place the City in an untenable position. If this Court were to conclude that the councilmembers were correct in their argument that the imposition of contempt sanctions against them was improper, then the City alone would bear the full force and effect of this—and any future—contempt order. But, in fact, the City's liability necessarily depends on the councilmembers. The City has relied and must continue to rely on the individual councilmembers to undertake the affirmative acts necessary to purge the City of contempt and to fulfill the City's ongoing obligation to comply with the remedial decree and the district court's orders. Thus, the issues relating to contempt sanctions against the City and the issues relating to sanctions against members of the City Council are inseparable. A full presentation of the issues

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September 14, the district court reiterated that any subsequent refusal of the Council to comply with *any* of its orders would result in the resumption of contempt fines against the City at this $1 million per day level. Transcript of September 14, 1988 Hearing, *United States* v. *Yonkers*, No. 80 Civ. 6761 (LBS), 2-3.

raised in the individual councilmembers' petitions requires this Court to consider the City's arguments regarding the effect of any resulting decision on the City and its citizens.

I. This Petition Raises An Important Question Of Federal Law Regarding The Appropriate Target Of Federal Contempt Sanctions Designed To Coerce Performance Of Affirmative Legislative Acts By A Municipal Government.

On July 26, 1988, the district court ordered the City to take steps to enact "the legislative package relating to the long-term plan." App., *infra*, 61a. The clearly articulated purpose of that order was to compel the City Council to adopt the requisite legislation implementing the Long Term Plan Order. The City Council was the only municipal actor with authority to adopt the implementing resolution and thereby to avoid violating the district court's July 26 Order.[6] Indeed, the fact that the

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[6] The court of appeals suggested that the City—presumably through the City Manager—could have taken steps toward compliance with the July 26 order, such as (1) requesting the Governor of New York to remove one or more councilmembers for misconduct or (2) requesting the New York Financial Control Board for the City of Yonkers to "take whatever action its broad authorizing statute permits it to take under the current circumstances." App., *infra*, 26a.

That assertion is incorrect. The "City" could not take the drastic steps suggested by the court without authorization from its sole policymaking body—the City Council. Certainly, the City Manager, who serves solely at the pleasure of the Council, had no such authority. In any case, given the widespread publicity surrounding the contempt sanctions, the Governor of New York and the Financial Control Board clearly were aware of the situation in Yonkers. It is fanciful to suggest that an unauthorized "request" from any employee of the City would have made either of those parties more inclined to intervene. Moreover, it is questionable what, if any, authority the Control Board might have exercised. Regardless of the authority of these third parties to take action in the absence of the Council's approval, the City did take the only direct and

contempt order distinguished between the City and the individual members of the City Council suggests that the district court recognized the discrete interests at stake.

In its opinion affirming the adjudication of contempt against the City, as well as the individual councilmembers, the court of appeals ignored one of the fundamental precepts of civil contempt. This Court often has observed that the nature of a civil contempt sanction is such that the contemnor "carr[ies] the key of his prison in his own pocket." *Maggio* v. *Zeitz*, 333 U.S. 56, 68 (1948), citing *Penfield Co.* v. *Securities & Exchange Commission*, 330 U.S. 585, 590 (1947); see *Uphaus* v. *Wyman*, 360 U.S. 72, 81 (1959); *United States* v. *United Mine Workers*, 330 U.S. 258, 331 (1947) (Black, J., concurring in part and dissenting in part). Thus, a party who is the subject of civil contempt is able to "purge" itself of the contempt and avoid additional sanctions by complying with the order of the court. Here, the members of the City Council—or even a single member willing to change his vote—held the "keys" to release themselves from potential incarceration and to halt further fines.[7] But, although the City was a separate party to the contempt proceedings, the individual councilmembers also carried the *only* keys that would release the City from bankrupting liability. The City was wholly dependent on the affirmative votes of four councilmembers to purge itself of the contempt.[8]

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responsible course of action available to it when the Council refused to act—the City, through its counsel, twice requested that the district court use its own equitable powers to adopt the appropriate ordinance, and thereby avoid a "showdown" with the councilmembers. App., *infra*, 9a, 11a. The court rejected that suggestion.

[7] Because the Council voted four to three against the adoption of the resolution, an affirmative vote by a single additional councilmember would have either avoided the City's initial contempt adjudication or purged it of contempt.

[8] If this Court were to hold that the imposition of sanctions on the individual councilmembers was inappropriate, as the council-

The imposition of contempt sanctions in the unusual structure of the proceeding below also conflicts with this Court's warning that "[e]very precaution should be taken that orders issue . . . only when it appears that obedience is within the power of the party being coerced by the order." *Maggio*, 333 U.S. at 69. This Court has frequently recognized that civil contempt sanctions must not issue against parties who are unable to purge themselves of contempt. This Court recently reiterated that

> [o]ur precedents are clear . . . that punishment may not be imposed in a civil contempt proceeding when it is clearly established that the alleged contemnor is unable to comply with the terms of the order.

Hicks ex rel. Feiock v. *Feiock*, 108 S.Ct. 1423, 1433 n.9 (1988) (citations omitted). "In a civil contempt proceeding such as this, of course, a defendant may assert a *present* inability to comply with the order in question." *United States* v. *Rylander*, 460 U.S. 752, 757 (1983) (citations omitted) (emphasis in original).

In the instant case, the court of appeals failed to acknowledge the City's present inability to comply with the district court's order. The City was wholly without authority to enact the legislation as required by the order. Obedience to the court's order hinged solely on the *individual councilmembers'* evaluations of the legal, social, political and personal costs and benefits of compliance. Under New York law, the City had neither power to control the Council nor power to comply with the order of the district court.

In the specific context of desegregation decrees, this Court also has stated that the appropriate targets of such decrees are those individuals or agencies that have the

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members argue in their petitions, the tension between the party holding the "keys" (the councilmembers) and the party that is the target of the sanctions (the City) would become even further exacerbated.

power to take the policy-making steps necessary to implement the order. For example, in *Griffin* v. *County School Bd.*, 377 U.S. 218 (1964), this Court stated that "[a]ll of [the parties defendant] have duties which relate directly or indirectly to the financing, supervision, or operation of the schools in Prince Edward County." *Id.* at 232.[9] The Court also noted that "the District Court may, if necessary to prevent further racial discrimination, require the Supervisors to exercise *the power that is theirs* to levy taxes to raise funds. . . ." *Id.* at 233 (emphasis added). Here, by contrast, the City, as a municipal corporation distinct from its policymaking officers, had no "duties which relate directly or indirectly" to the subject of the court's order—the enactment of legislation to implement the Long Term Plan Order. That power resided solely with the City Council.

At bottom, the court of appeals based its conclusion on an unrealistic and one-dimensional view of the City and its structure of corporate governance. The court stated that "[u]nder the circumstances of this case, the Council's defiance of the Consent Judgment and the implementing orders of the District Court is the defiance of the City, and the City, along with the defiant council members, may be subject to civil contempt sanctions." App., *infra*, 27a. Thus, the court of appeals viewed the Council as the equivalent of the City. This narrow outlook blurs all factual and legal distinctions between the Yonkers City Council and the City of Yonkers and ignores the practical relationship between the two. The Council, of course, is the governing body of the City; but the councilmembers and the City are separate parties and, as this case illustrates, their interests in this

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[9] The defendants were "the Board of Supervisors, School Board, Treasurer, and Division Superintendent of Schools of Prince Edward County, and the State Board of Education and the State Superintendent of Education." *Griffin*, 377 U.S. at 232.

remedial phase of the desegregation litigation were clearly at odds.

On the most basic, structural level, the City is a municipal corporation—a separate governmental entity to which the sovereign State of New York has delegated certain powers and duties. N.Y. Const. art. IX; see generally N.Y. Gen. City Law; N.Y. Gen. Mun. Law. More significantly, the City is the governmental entity comprised of the citizens and taxpayers of Yonkers. These individuals who collectively constitute the "City" have provided the tax dollars to finance payment of the contempt fines imposed on the City. But, these individuals—and the City as a municipal body—were powerless to halt the drain on the City's coffers absent an affirmative majority vote of the seven member Council. Petitioner therefore contends that because the City—as a separate party to the contempt proceedings—was unable to purge itself of the contempt, the court below erred in imposing "bankrupting fines" on the City. Accordingly, the Court should grant the petition to resolve this issue whether, in the context of the proceedings below, the City properly was subject to sanctions (in addition to those imposed on the councilmembers) when the City was unable to "cure" its contempt.[10]

II. The Decision Below Raises A Substantial And Undecided Issue Regarding The Application Of The Excessive Fines Clause Of The Eighth Amendment To Civil Actions.

The opinion of the Second Circuit also raises a substantial and undecided issue of law under the Eighth Amendment, which provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel

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[10] Obviously, this issue would become even more complicated if the Court were to hold, as the councilmembers argue, that the individual members of the Council are *not* subject to coercive civil contempt sanctions in their individual capacities.

and unusual punishments inflicted." This Court has not yet determined the applicability of the Excessive Fines Clause of the Eighth Amendment to civil actions.[11]

1. Because the court of appeals assumed that the sanction was imposed in the context of a civil contempt order, it did not undertake any analysis of the propriety of the sanction under the Excessive Fines Clause. The court stated that "[e]ven if the Excessive Fines Clause should be determined to apply to punitive damages, it does not apply to civil contempt sanctions imposed to obtain compliance with court orders." App., *infra*, 29a.[12] But, despite the court's characterization of the sanctions as civil in nature, the punitive aspects of the sanctions, as applied to the City, are predominant.

"Some punishments, though not labeled 'criminal' by the State, may be sufficiently analogous to criminal punishments in the circumstances in which they are administered to justify application of the Eighth Amendment." *Ingraham* v. *Wright*, 430 U.S. 651, 669 n.37 (1977); *id.* at 685 (White, J., dissenting); see *Feiock*, 108 S.Ct. at 1429 (labels affixed to contempt proceeding not controlling). Moreover, this Court repeatedly has recognized the potential for punitive aspects in a "civil" contempt proceeding, stating that "'[i]t is not the fact of punishment but rather its character and purpose that often serve to distinguish' civil from criminal contempt."

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[11] This Court has not determined the appropriate scope of the Excessive Fines Clause even in the criminal context. One commentator has attributed this to the fact that "because the guarantee against cruel and unusual punishment has been construed to forbid punishment that is excessive but not otherwise unusual, the last clause [of the Eighth Amendment] has tended to subsume the first two." Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 147 (1986).

[12] Nevertheless, the court of appeals stated that the doubling of the $100 per day fine would constitute an abuse of discretion at the point when the daily fine exceeded $1 million. App., *infra*, 31a.

Shillitani v. *United States*, 384 U.S. 364, 369 (1966), quoting *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 441 (1911); see *Feiock*, 108 S.Ct. at 1429; *Oriel* v. *Russell*, 278 U.S. 358, 363 (1929).[13]

This Court recently reiterated that, to determine whether a contempt is civil or criminal in nature, "the critical features are the substance of the proceeding and the character of the relief that the proceeding will afford." *Feiock*, 108 S.Ct. at 1429; see *id.* at 1437 (O'Connor, J., dissenting) (courts should infer civil or criminal nature from "objective features of the proceeding and the sanction imposed"). This Court specifically stated:

> If the relief provided is a fine, it is remedial when it is paid to the complainant, and punitive when it is paid to the court, though a fine that would be payable to the court is also remedial *when the defendant can avoid paying the fine simply by performing the affirmative act required by the court's order.*

Feiock, 108 S.Ct. at 1429-30 (emphasis added). Because the fine in the instant case was paid to the court and the City could not perform the act mandated by the district court's order—enacting the implementing legislation—the contempt sanction was punitive.

Moreover, because the target of the fine—the City—cannot comply with the order, the contempt order lost most, if not all, of its coercive purpose and became punitive. This Court has stated that "to jail one for a contempt for omitting an act he is powerless to perform would . . . make the proceeding purely punitive, to describe it charitably." *Maggio*, 333 U.S. at 72. Similarly, to fine the City for failing to enact legislation—an act that it was powerless to perform without the cooperation of separate and distinct parties to the proceeding

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[13] By contrast, the Court in *Shillitani* held that nominally criminal contempt was civil contempt because its primary purpose was to coerce answers to grand jury questions. 384 U.S. at 370.

(the individual City Council members)—gives the contempt order a "purely punitive" character. Assuming that the City could be convicted of violating a criminal law in the circumstances of this case, a fine of $1 million per day of violation would greatly exceed any conceivable fine that could be imposed for such a conviction. It would be an anomaly to allow the fine imposed upon the City to evade constitutional review simply because of the label attached to the proceeding by the courts below.

In other contexts, this Court has considered the following factors to determine if a particular order is a punitive sanction to which the Eighth Amendment applies:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned. . . .

Kennedy v. *Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963) (footnotes omitted); *Bell* v. *Wolfish*, 441 U.S. 520, 537-38 (1979). The application of these factors to this case indicates that, while the contempt sanctions are intended to be coercive in nature, they are punitive.[14]

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[14] While criminal contempt is obviously punitive, this does not change the fact that some civil contempt may also be punitive. In fact, the same contumacious behavior may subject a party to both criminal and civil coercive contempt. *See United Mine Workers*, 330 U.S. at 303-04. Had the district court decided to pursue criminal contempt sanctions against the City after the City Council failed to comply with the Court's order, there is no question that the imposition of a fine of up to $1 million per day would implicate the Excessive Fines Clause.

First, the contempt sanctions were imposed after a knowing violation by the City Council. Second, the "bankrupting" fines imposed by the district court have both retributive and deterrent purposes.[15] Thus, the sheer magnitude of the fine imposed by the district court indicates that the fine has both a retributive and deterrent element.[16]

The decision below upheld, with one modification, fines imposed by the district court in a civil contempt context that are, in fact, punitive and criminal in nature. This Court should grant this petition to determine the substantial and unresolved issue of whether such fines can evade constitutional scrutiny under the Excessive Fines

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[15] The district court's observations that the City should "recognize its obligation to conform to the laws of the land . . . in the way in which any responsible community concerned about the welfare of its citizens functions," app., *infra*, 12a, plainly indicate the element of deterrence that motivated the district court to adjudicate the City in contempt. The court obviously wanted to make an example of the City, both to punish it for the contumacious conduct of the Council and to deter other municipalities and governmental entities from disobeying desegregation orders.

[16] The United States, in asking the court to proceed through contempt sanctions rather than through the court's proposed Affordable Housing Commission (*supra*, 4-5), strongly suggested that it intended the sanctions to have a punitive and deterrent component:

> One of the things that we all learn as we grow up, your Honor, is from a very early age there has to be respect for the law and in this case quite plain and simply the City of Yonkers has shown a total disrespect for the law. . . . Your Honor, we believe that the court has to do something here. We believe the court has to send a message to the city that it cannot continue to flout the court's orders and then have the court let it off the hook by doing something else.

Transcript of July 12, 1988 Hearing, *United States* v. *Yonkers*, No. 80 Civ. 6761 (LBS), 10-12 (Exhibit E to August 30, 1988 City of Yonkers Application to the United States Supreme Court for a Stay). The court rejected the arguments of the NAACP and the City and followed the United States' recommendation that contempt sanctions be imposed.

Clause of the Eighth Amendment simply because the courts below attached a "civil" label to the proceeding.

2. Even if the sanction imposed is not predominantly "criminal" in nature, this case presents the issue whether purely civil sanctions are subject to the Excessive Fines Clause of the Eighth Amendment. The issue of whether this Clause of the Eighth Amendment applies to civil cases has been presented to this Court in two of its last three terms. For prudential reasons, however, the Court has declined to reach the issue. See *Bankers Life and Casualty Co.* v. *Crenshaw*, 108 S.Ct. 1645, 1649 (1988) (Eighth Amendment claim not raised and passed on below); *Aetna Life Insurance Co.* v. *Lavoie*, 475 U.S. 813, 828 (1986) (disposition of one issue makes consideration of Eighth Amendment issue unnecessary). In both of these cases, however, this Court has noted the significance of the issue of the application of the Excessive Fines Clause in the civil context. In *Bankers Life*, the Court recognized that the Eighth Amendment issue is a "question of some moment and difficulty." 108 S.Ct. at 1651. This Court also has stated that the Eighth Amendment argument "raise[d] important issues which, in an appropriate setting, must be resolved." *Aetna Life Insurance Co.*, 475 U.S. at 828-29.

This case provides such a setting, squarely presenting the issue of the application of the Excessive Fines Clause to civil actions. The Court should address this important federal question and hold that the Excessive Fines Clause is applicable to civil proceedings. This Court already has decided cases presenting the issue of the civil application of two of the three clauses of the Eighth Amendment—the Cruel and Unusual Punishment Clause and the Excessive Bail Clause—but has yet to determine whether the Excessive Fines Clause applies in the civil context. Although the Court has limited the application of the Cruel and Unusual Punishments Clause of the Eighth Amendment to situations "after the State has complied with

the constitutional guarantees traditionally associated with criminal prosecutions," *Whitley* v. *Albers*, 475 U.S. 312, 318 (1986); *Ingraham*, 430 U.S. at 671 n.40, there is no concomitant limitation on the Excessive Fines Clause.

Moreover, in *Carlson* v. *Landon*, 342 U.S. 524 (1952), the Court was presented with the issue of whether the Excessive Bail Clause of the Eighth Amendment requires the imposition of bail in noncriminal deportation proceedings. The Court noted that the Eighth Amendment does not bar Congress from defining classes of offenses for which bail is not available. *Id.* at 545. Instead, the Excessive Bail Clause merely requires that if bail is available, it should not be excessive. *Id.* The Court stated "[w]e think, clearly, here that the Eighth Amendment does not require that bail be allowed under the circumstance of these cases." *Id.* at 546. In *Carlson*, this Court suggested, but did not decide, that the Excessive Bail Clause applied to the civil deportation proceedings at issue in that case. This Court should explicitly decide whether the second clause of the Eighth Amendment—the Excessive Fines Clause—limits the magnitude of fines that may be imposed in a civil contempt proceeding.

At the outset, the language of the Excessive Fines Clause—in contrast to other constitutional provisions—does not suggest that the provision should be limited to criminal cases.[17] See U.S. Const. amend. V ("No person shall be held to answer for a capital, or otherwise infamous *crime*, unless on a presentment or indictment of a Grand Jury . . . nor shall be compelled in any *criminal case* to be a witness against himself") (emphasis added); U.S. Const. amend. VI (amendment applies "[i]n *all criminal prosecutions*") (emphasis added).

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[17] In *Carlson* v. *Landon*, this Court relied heavily on the language of the Eighth Amendment, stating that "the very language of the Amendment fails to say all arrests must be bailable." 342 U.S. at 546.

Moreover, the sparse legislative history of the Eighth Amendment suggests that the Framers did not intend to limit the application of the Excessive Fines Clause to the criminal context. The First Congress amended what was to become the Fifth Amendment by adding the phrase "in any criminal case" on the floor of the House. 1 *Annals of Congress* 753 (Gales & Seaton eds. 1834).[18] Immediately after adopting this amendment and approving the Fifth Amendment, the Framers turned to consideration of the Eighth Amendment. No such limiting language was even suggested by the drafters of the Eighth Amendment, much less adopted. 1 *Annals of Congress* 754.

In light of the minimal historical record of the Eighth Amendment, this Court has looked to the relevant English history to interpret this Amendment. See *Solem* v. *Helm*, 463 U.S. 277, 284-86 (1983); *Ingraham*, 430 U.S. at 664. In *Solem* v. *Helm*, this Court explicitly relied upon the amercements clauses of the Magna Carta to interpret the Eighth Amendment. 463 U.S. at 284. In reaching its conclusion that the Cruel and Unusual Punishments Clause of the Eighth Amendment required that sentences be proportionate to crimes, this Court stated that "[i]n 1215 three chapters of Magna Carta were devoted to the rule that 'amercements' may not be excessive." *Id.* (footnotes omitted).

At the time of the Magna Carta, contempt in the lower courts was apparently punished by amercements. See 1 F. Pollock & F. Maitland, *The History of English Law:*

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[18] Representative Lawrence "alluded to that part [of the amendment] where a person shall not be compelled to give evidence against himself. He thought it ought to be confined to criminal cases, and moved an amendment for that purpose; which amendment being adopted, the clause as amended was unanimously agreed to by the committee, who then proceeded to the sixth clause of the fourth proposition, in these words, 'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.'" 1 *Annals of Congress* 753-54.

Before the Time of Edward I 519 (1968).[19] Such an amercement imposed in a civil contempt context would thus be subject to the proportionality requirement of Chapter 20 of the Magna Carta.[20] Similarly, the Excessive Fines Clause should apply to a modern civil contempt fine to ensure that the Eighth Amendment preserves the rights that the Framers had as English subjects. Cf. *Solem*, 463 U.S. at 286.

The issue of the applicability of the Excessive Fines Clause in the civil context has arisen most frequently in challenges to punitive damages. While no court of appeals has squarely held that the Clause applies in the civil

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[19] Contempt in the king's court was punishable by imprisonment. *See* 1 F. Pollock & F. Maitland, *The History of English Law: Before the Time of Edward I* 519 (1968).

[20] Chapter 20 reads:

> A freeman shall not be amerced for a slight offence, except in accordance with the degree of the offence; and for a grave offence he shall be amerced in accordance with the gravity of the offence, yet saving always his "contenement"; and a merchant in the same way, saving his "merchandise"; and a villein shall be amerced in the same way, saving his "wainage"—if they have fallen into our mercy: and none of the aforesaid amercements shall be imposed except by the oath of honest men of the neighbourhood.

Magna Carta, ch. 20., *reprinted in* W. McKechnie, *Magna Carta: A Commentary on the Great Charter of King John* 284 (1914).

It is clear that municipalities, in certain situations, were subject to amercements. *See* 1 Pollock & Maitland at 678 ("The counties, hundreds and townships are always being fined and amerced for wrongful acts and defaults."). The following are examples in which the precursors to cities were amerced at early English common law:

> The men of Tixover are amerced for refusing to swear the king's assize, the township of Isle for not making suit after a murderer, the township of Rock for doing nothing when a man was slain in their vill, the township of Midwinter for receiving a man who was not in frankpledge, and the township of Newbold for a concealment and for burying a dead man without the view of the sheriff's serjeant.

Id. at 565.

context,[21] at least two courts of appeals have held that civil damages were not excessive, after assuming that the Excessive Fines Clause applied to civil actions. *Kelco Disposal, Inc.* v. *Browning-Ferris Indus.*, 845 F.2d 404, 410 (2d Cir. 1988); *Brown & Williamson Tobacco Corp.* v. *Jacobson*, 827 F.2d 1119, 1143 n.13 (7th Cir. 1987), *cert. denied*, 108 S.Ct. 1302 (1988). Because of the importance of the fundamental undecided issue concerning the scope of the Eighth Amendment, the Court should grant the petition to determine whether the Excessive Fines Clause applies to civil contempt actions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 23, 1988

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[21] Several courts have concluded that the Eighth Amendment does not limit the magnitude of punitive damages. *See, e.g., Electro Services, Inc.* v. *Exide Corp.*, 847 F.2d 1524, 1530 (11th Cir. 1988); *Campus Sweater & Sportswear Co.* v. *M.B. Kahn Construction Co.*, 515 F. Supp. 64, 108 n.129 (D.S.C. 1979), *aff'd mem.*, 644 F.2d 877 (4th Cir. 1981).

APPENDICES

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 1679-1682—August Term 1987

Argued: August 17, 1988 Decided: August 26, 1988

Docket Nos. 88-6178, -6184, -6188, -6190

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

and

YONKERS BRANCH-NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,
Plaintiffs-Intervenors-Appellees,

v.

CITY OF YONKERS,
Defendant-Contemnor-Appellant,

YONKERS BOARD OF EDUCATION and
YONKERS COMMUNITY DEVELOPMENT AGENCY,
Defendants.

In the Matter of HENRY SPALLONE, PETER CHEMA, NICHOLAS LONGO, and EDWARD FAGAN,
Contemnors-Appellants.

Before: NEWMAN, MINER, and MAHONEY, *Circuit Judges.*

Appeals from orders of the District Court for the Southern District of New York (Leonard B. Sand, Judge) adjudicating the City of Yonkers and four council members in civil contempt and imposing coercive monetary sanctions for failure to comply with a court order implementing a consent judgment.

Affirmed as to the council members: affirmed, as modified, as to the City.

Michael W. Sculnick, New York, N.Y. (Stanley R. Strauss, Vedder, Price, Kaufman, Kammholz & Day, New York, N.Y.; Rex E. Lee, Carter G. Phillips, Sidley & Austin, Wash., D.C.; Paul W. Pickelle, Corp. Counsel, Yonkers, N.Y., on the brief), for defendant-contemnor-appellant.

Anthony J. Mercorella, New York, N.Y. (Vincent R. Fontana, James L. Fischer, Vincent R. Cappucci, Wilson, Elser, Moskowitz, Edelman & Dicker, New York, N.Y., on the brief), for contemnor-appellant Spallone.

James D. Harmon, Jr., New York, N.Y. (Barry G. Saretsky, Martin S. Kaufman, Michael J. Eng, Aaron F. Fishbein, Bower & Gardner, New York, N.Y., on the brief), for contemnor-appellant Chema.

Lawrence R. Sykes, Yonkers, N.Y., for contemnors-appellants Longo and Fagan.

Linda F. Thome, Dept. of Justice, Wash., D.C. (Wm. Bradford Reynolds, Asst. Atty. Gen., Mark R. Disler, Deputy Asst. Atty. Gen., David K. Flynn, Dept. of Justice, Wash., D.C., on the brief), for plaintiff-appellee.

Michael H. Sussman, Yonkers, N.Y. (Sussman & Sussman, Yonkers, N.Y., on the brief), for plaintiffs-intervenors-appellees.

JON O. NEWMAN, *Circuit Judge*:

This appeal presents important issues concerning the enforcement of orders of a United States District Court requiring action by a municipality to remedy violations of the Constitution and statutes of the United States. The principal issues are whether members of the Yonkers City Council may be required to vote to implement remedies contained in a consent judgment agreed to by the City and approved by the City Council, and whether the City, in addition to the council members, may be subjected to the coercive sanctions of civil contempt when the agreed upon legislative action has not been taken. The issues arise on appeals by the City of Yonkers and four members of the Yonkers City Council from orders of the District Court for the Southern District of New York (Leonard B. Sand, Judge) adjudicating the City and the council members in civil contempt and imposing coercive sanctions. We conclude that under the circumstances of this case the recalcitrant council members may be required to vote to implement the consent judgment and that the City, in addition to the council members, may be adjudicated in contempt and subjected to coercive sanctions for failure to abide by the consent judgment and subsequent implementing orders of the District Court. We also conclude that the amount of the monetary sanctions imposed on the City, though properly substantial, should be somewhat reduced. We therefore affirm the order adjudicating the council members in contempt and affirm, as modified, the order adjudicating the City in contempt.

BACKGROUND

1. *The Underlying Lawsuit*

The United States filed the underlying lawsuit on December 1, 1980, against the City of Yonkers, the Yonkers Community Development Agency, and the Yonkers Board of Education. The complaint made two basic allegations: (a) that the City and the Community Development Agency had "intentionally . . . perpetuated and seri-

ously aggravated residential racial segregation" in violation of the Constitution and Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3619 (1982), and (b) that the racial segregation in the City's public schools had been "caused in substantial part by intentional, racially discriminatory acts and omissions" of the City and the Board of Education in violation of the Constitution. The National Association for the Advancement of Colored People (NAACP) was granted leave to intervene, and the suit was subsequently certified as a class action on behalf of all Black residents of Yonkers who currently reside in or are eligible to reside in publicly assisted housing or who are parents of children attending Yonkers public schools.

After a bench trial lasting ninety days over the course of fourteen months in 1983 and 1984, the District Court found the City and the Community Development Agency liable for intentional housing segregation and found the City and the Board of Education liable for intentional school segregation. *United States v. Yonkers Board of Education*, 624 F. Supp. 1276-1553 (S.D.N.Y. 1985). With respect to the housing violations, with which we are concerned on this appeal, the District Court found that the City had deliberately concentrated virtually all of its public and other subsidized housing in the southwest quadrant of Yonkers and had done so to maintain residential segregation. *Id.* at 1372-76. After conducting a six-day hearing as to appropriate remedies, the District Court issued a Housing Remedy Order on May 28, 1986. *United States v. Yonkers Board of Education*, 635 F. Supp. 1577 (S.D.N.Y. 1986).[1]

The Housing Remedy Order included provisions for the construction of 200 units of public housing and for the planning of additional units of subsidized housing.

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[1] An order providing a remedy for the school segregation violation was issued May 13, 1986. *United States v. Yonkers Board of Education*, 635 F. Supp. 1538 (S.D.N.Y. 1986).

The City had previously agreed to provide acceptable sites for the 200 units of public housing as a condition of receiving its 1983 Community Development Block Grant from the United States Department of Housing and Urban Development (HUD). Part IV of the Housing Remedy Order established a precise timetable within which the City was required to furnish HUD with necessary documents to secure HUD's approval of funds for the 200 units. *Id.* at 1580-81. The City was required to propose sites for 140 units within thirty days and sites for the remaining 60 units within ninety days.

Part VI of the Housing Remedy Order accorded the City broad discretion to make its own determinations concerning additional units of subsidized housing. The District Court did not specify the number of units to be built, the time by which they must be built, or the degree of subsidization. Part VI contained essentially two requirements. First, the additional units must be located in existing residential areas in east or northwest Yonkers. Second, the City must prepare a plan specifying, among other things, the number of subsidized units to be constructed or acquired, their location, and the rent levels or degreee of subsidization. *Id.* at 1582. The City was given until November 15, 1986, nearly six months, to present its plan.

This Court affirmed the liability and remedy rulings of the District Court on December 28, 1987. *United States v. Yonkers Board of Education*, 837 F.2d 1181 (2d Cir. 1987), and the Supreme Court denied the City's petition for a writ of certiorari. 108 S. Ct. 2821 (1988). None of the requirements of the Housing Remedy Order was stayed during the course of appellate review.

2. *Attempts to Implement the Housing Remedy Order*

With respect to the requirement to propose sites for the 200 units of public housing within thirty and ninety days, the City totally defaulted. No site was proposed.

With respect to the requirement to submit a plan within six months for additional subsidized housing, the City again totally defaulted. On the appointed day, November 15, 1986, the City informed the District Court that it would not comply. The United States and the NAACP then moved for an adjudication of civil contempt and the imposition of coercive sanctions. Rather than proceed immediately to considerations of contempt sanctions, the District Court patiently endeavored to secure voluntary compliance. In February 1987 the City Council agreed to the appointment of an Outside Housing Advisor to identify sites for the 200 units of public housing and to draft a long-term plan for the additional units of subsidized housing. Throughout the rest of 1987 attention was focused primarily on the requirement for proceeding with the 200 units of public housing. The Advisor recommended placing the 200 units in small clusters on scattered sites. In April 1987 the City Council proposed to place the 200 units on twelve sites but rendered the proposal illusory by conditioning it on the patently unacceptable right of local civic associations to select the tenants. By the end of 1987 the City had taken no significant action to comply with the 1986 Housing Remedy Order.

In January 1988, following this Court's affirmance of the liability and remedy decisions and with the District Court contemplating designation of sites for the 200 units, the parties began negotiations to settle the compliance issues. On January 19, when prospects for agreement appeared bleak, the District Court pointed out to the City that the Court could proceed either by "deeming things to have been done which it was the obligation of Yonkers to do, or it can order Yonkers to do those things." On January 25, counsel for the City informed the Court that the City was contemplating a consent judgment and that the City was prepared to designate seven sites for the 200 units of public housing and to

implement a long-term plan to achieve the goal of 800 units of subsidized housing that had been recommended by the plaintiffs. A consent decree was agreed to by the parties that same day, approved by the City Council on January 27, and entered as a consent judgment of the District Court on January 28 ("the Consent Judgment").

With respect to the 200 units of public housing, the Consent Judgment renewed the City's commitment to build the units and identified seven specific sites. The judgment also committed the City to take specific steps within a prescribed timetable to have the 200 units built. Finally, the City pledged that it would not seek further review of the District Court's 1986 decision or any subsequently entered decree to the extent that such decrees relate to the 200 units.

With respect to the 800 units of subsidized housing, the Consent Judgment included several provisions, which are at the core of the pending appeal. First, the City acknowledged that the goal of 800 units was "an appropriate target in fulfilling its obligations pursuant to Part VI" of the Housing Remedy Order. Consent Judgment § 12. Next, the City pledged to make good-faith efforts to achieve 600 of the units in annual installments of 200 units within each of the next three years. *Id.* Next, and of special significance, the City agreed to adopt "legislation" on a number of topics to facilitate meeting the goal of 800 units of subsidized housing. *Id.* § 17. Among other things, the City agreed to adopt legislation granting necessary tax abatements, providing for zoning changes, and establishing, within ninety days, a package of incentives for local development. *Id.* § 17(b), (d), (e). Finally, the City agreed with the other parties to work diligently to agree on various unresolved matters primarily concerning financial aspects of the 800 units and to submit a second consent decree to the Court by February 15, 1988. *Id.* § 18.

Rather than abide by the terms of the Consent Judgment, the City promptly attempted to disavow it. Citing intense community opposition to the Consent Judgment, especially the public housing provisions, the City moved on March 21, 1988, to delete the provisions in which it had agreed not to seek further appellate review concerning the obligation to build the 200 units. To demonstrate the lengths to which it was prepared to go to be relieved of its public housing commitment, the City offered to return approximately $30 million of federal funds in the event the Supreme Court should set aside the public housing provisions of the Housing Remedy Order. The City's motion to amend the Consent Judgment was denied on March 31, and that ruling has not been appealed.

On April 12, at a chambers conference with the District Court, the City announced that it was "not interested" in completing negotiations on the terms of a long-term plan for the 800 units of subsidized housing, as required by section 18 of the Consent Judgment. In light of this development, the United States and the NAACP submitted to the Court on May 2 a proposed Long Term Plan Order based largely on a draft that had been prepared by the City's lawyers during the negotiations that had ensued prior to April 12. The City opposed the proposed order and noted specific objections. The District Court directed the plaintiffs to revise their proposed Long Term Plan Order in light of the City's objections. On June 13, following a hearing and further changes, the District Court entered the Long Term Order. As revised by the parties and by the Court, the Long Term Plan Order accommodated most of the City's objections. The Order provided considerable detail for the legislation that the City had committed itself to adopt in section 17 of the Consent Judgment.

By the time the Long Term Plan Order was entered, the City was one month in default on the obligation, agreed to in the Consent Judgment, to adopt implement-

ing legislation. The United States therefore asked the Court to set a timetable for enactment of the legislation. On June 21 counsel for the City informed the Court that a consulting firm had been retained to draft the legislation and that City Council action could be anticipated at the next council meeting, perhaps in August. Concerned about the prospect of delay, a concern heightened by the City Council's adoption on June 14 of a resolution declaring a moratorium on all public housing in Yonkers, the District Court requested that the City Council pass a resolution adopting the provisions of the Long Term Plan Order. On June 28 the City Council voted against the resolution "indicating [the Council's] commitment to the implementation of" the Housing Remedy Order, the Consent Judgment, and the Long Term Plan Order.

The following day the District Court directed the plaintiffs to submit an order requiring the City to take "specific implementing action" under a prescribed timetable, violation of which would subject the City to contempt sanctions. In response to the plaintiffs' proposed order setting forth such a timetable, the City argued that the defeat of the resolution on June 28 indicated that the City would not voluntarily adopt legislation contemplated by the Long Term Plan Order and suggested that the Court itself should enter an order adopting the necessary legislation. At a hearing on the proposed timetable on July 12, the District Court invited the parties' comments on the possible creation by the Court of an Affordable Housing Commission to exercise the City Council's functions concerning implementation of the housing remedy orders. The City opposed creation of the Commission because it would divest the Council of its "core legislative as well as executive functions."

3. *The Prospect of Contempt*

Prior to this point in the litigation, the District Court had on at least two occasions warned the City that it would face a contempt adjudication and coercive sanc-

tions if it failed to abide by the Consent Judgment. On July 26 the District Court issued an order that gave the City one final opportunity to comply and detailed the precise consequences of continued noncompliance. The July 26 order required the City to enact by August 1 "the legislative package relating to the long-term plan as described in Section 17 of the [Consent Judgment] and the Long Term Plan Order." The "legislative package" was set forth in detailed Affordable Housing Ordinance, which had been drafted by the City's consultants and marked as an exhibit at the July 26 hearing.

The July 26 order also established the schedule and consequences of civil contempt proceedings to occur in the event that the legislation was not adopted by August 1. If that occurred, the City and the council members were to show cause at 10:00 a.m., August 2, why they should not be judged in contempt. If such cause was not shown, each council member failing to vote for such legislation would be fined $500 per day, and, if the legislation was not passed by August 10, such council member would be imprisoned on August 11. The contempt sanction against the City would be daily fines starting at $100 on August 2 and doubling in amount each day of continued noncompliance. The cumulative total of the fines against the City would exceed $10,000 by day 7, exceed $1 million by day 14, exceed $200 millon by day 21, and exceed $26 billion by day 28. The order provided that a council member could be purged of contempt by voting in favor of the legislation or by enactment of the legislation. The City could be purged of contempt by enactment of the legislation. The order further provided that all fines would be paid into the Treasury of the United States and would not be refundable, that the Council would meet at least once a week to vote on the legislative package, and that any incarcerated council member would be released to attend such meetings.

On July 28, the District Court informed all counsel by letter that the July 26 order "will be satisfied if the

City Council, on or before August 1st, adopts a resolution committing itself to enact the Affordable Housing Ordinance within the minimum time prescribed for notice pursuant to state law." This letter responded to the City's expressed concern that state law specified notice and public hearing requirements in connection with enactment of zoning ordinances.

On August 1, the City Council met to consider a resolution expressing the Council's intent to adopt the Affordable Housing Ordinance within the minimum time prescribed by state law. The Council defeated the resolution by a vote of four to three.

4. *The Contempt Adjudications*

As contemplated by the July 26 order, the District Court held a hearing on August 2 to afford the City and the council members an opportunity to show cause why they should not be adjudicated in civil contempt. Counsel for the City reported that the City Council had taken two actions the previous night. First, the Council had scheduled a public hearing for August 15, thereby giving the required state law notice of a hearing on a proposed zoning ordinance. Second, the Council had defeated the resolution of intent to adopt the Affordable Housing Ordinance. With respect to contempt, the City made essentially three points. First, counsel argued that the City was powerless to compel the dissenting council members to vote in favor of the Affordable Housing Ordinance. Second, he urged the Court to order the legislation into effect, rather than hold the City in contempt. Third, he pointed out that the fines were punitive since the escalating amount of the fines would place the City in bankruptcy in three weeks.

The District Court rejected these contentions. The Court noted that the City had failed to discharge its responsibilities to comply with the orders of the Court. The City had not applied to the Emergency Financial

Control Board to take action or requested action by the Governor of New York. The Control Board was created to oversee Yonkers' financial condition and has an array of powers with respect to the City's financial affairs. 1984 N.Y. Laws ch. 103. Under the Yonkers City Charter, any elected officer may be removed from office by the Governor for "misconduct." Yonkers City Charter § C (2)-5. The Court was informed that the City had requested the Governor to use his "good offices" but had not requested him to "exercise powers and responsibilities he has as the governor of the state under the circumstances that now obtain." The Court also pointed out that by offering to have judgment of approximately $30 million entered against it as a means of avoiding its long-standing commitment to build the 200 units of public housing, the City had "crossed the line of any form of fiscal or other governmental responsibility."

Concerning the suggestion that the Court, rather than the City, adopt the Affordable Housing Ordinance, the Court observed:

> [Th]ere does have to come a moment of truth, a moment of reckoning, a moment when the City of Yonkers seeks not to become the national symbol of defiance to civil rights and to heap shame upon shame upon itself, but to recognize its obligation to conform to the laws of the land and not step by step, order by order, but in the way in which any responsible community concerned about the welfare of its citizens functions. That is not going to be accomplished by this court adopting the ordinance.

Finally, the Court rejected the claim that the contempt sanctions were punitive:

> What could be more remedial and less punitive than a fine schedule that begins at $100 a day? $100 for the first day is not going to bankrupt Yonkers. $200 for the second day is not going to bankrupt Yonkers.

> The dire picture that you paint supposes: A that the contempt continues; and B that no other agency intervenes. As I have said on a number of occasions, this court is not the only entity which is bound by oath to protect and defend the constitution.

The Court held the City in contempt, imposed the coercive sanctions set forth in the July 26 order, and entered written findings of fact.

The District Court then considered the four council members who had voted against the resolution of intent to adopt the Affordable Housing Ordinance, Nicholas Longo, Edward Fagan, Peter Chema, and Henry Spallone. Counsel for Longo and Fagan requested an adjournment to familiarize himself with the case. The District Court denied the request, expressing the view that the council members had been on notice since July 26 of the prospect they faced and the need to have counsel. The Court stated that it would proceed with the contempt adjudication but would afford counsel the opportunity at a later time to be heard with respect to any theory or circumstance not available at this time. Counsel then asserted that his clients had not acted in bad faith and contended that they had opposed the resolution of intent because adoption of the Affordable Housing Ordinance would have violated state law requirements for notice and hearing of zoning changes. When the Court inquired whether counsel was representing that but for the claimed procedural defect, the council members would have voted for the resolution, no such assurance was given. Nor was such assurance given when Longo and Fagan each addressed the Court directly.

Counsel for Chema requested a two-week adjournment, which was denied. The District Court again stated its determination to proceed that day but afforded counsel the opportunity to reopen the matter thereafter. The Court also offered the opportunity for an immediate evi-

dentiary hearing, which was declined. The Court then ascertained from Chema that he had received notice of the July 26 order and had voted against the resolution of intent the previous evening.

The District Court found Longo, Fagan, and Chema in contempt and imposed the sanctions set forth in the July 26 order. The Court also stated that, if any contemnor wished an evidentiary hearing, such request should be made by August 5 and that a hearing, if requested, would be held August 8. The Court again stated that "to obviate this question of state law and the dates contained in the state law provision" a vote in favor of a resolution of intent would constitute a purging of the contempt.

The fourth council member, Spallone, appeared without counsel and requested and was granted 24 hours to retain counsel. Spallone appeared with counsel at a hearing on August 4. At that time his counsel acknowledged that there was no factual issue in dispute. Counsel contended that his client could not be found in contempt because a legislator had an "unfettered" right to vote as he wishes. Counsel also urged that if the Court's order was violated, "it was done by the coun[ci]l corporate body per se." Finally, reversing the contention of the City, he urged the Court to "[p]unish the City of Yonkers, but don't punish my client."

The District Court found Spallone in contempt and made the finding retroactive to August 2.[2] By August 5 all four council members had informed the District Court that no evidentiary hearing was sought.

The District Court denied requests for stays by the City and the four council members. On August 9, after fines for seven days had become due, this Court stayed

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[2] Spallone has not challenged on appeal the retroactive aspects of the civil contempt sanction imposed upon him, and we decline to consider the issue *sua sponte*.

the contempt sanctions and ordered an expedited appeal. At the hearing of that appeal on August 17, the Court was informed that the public hearing noticed by the City Council on August 1 had been held on August 15. We were also informed that at the August 15 meeting the Council voted against the Affordable Housing Ordinance by a vote of four to three.

Discussion

A. *The Council Members*

1. *Procedural Objections*

The four council members contend that their contempt adjudications occurred without observance of the procedural protections of the Due Process Clause and those normally required for civil contempt proceedings. They contend that the proceedings were not initiated by orders to show cause, that they received inadequate notice of the charges, that their counsel were denied a reasonable time to prepare their defense, that issues concerning intent were not sufficiently explored, that the United States was not obliged to sustain its burden of proof, and that the judgments of contempt fail to identify the precise order violated.

A person charged with civil contempt is entitled to notice of the allegations, the right to counsel, and a hearing at which the plaintiff bears the burden of proof and the defendant has an opportunity to present a defense. *See In re Kitchen*, 706 F.2d 1266 (2d Cir. 1983); *In re Rosahn*, 671 F.2d 690 (2d Cir. 1982); *In re Di Bella*, 518 F.2d 955 (2d Cir. 1975); *see also* Rule 43(a) of the Rules of the Southern and Eastern Districts of New York.

With one exception, procedural requirements were fully observed. The order of July 26 served as a show cause order, giving the council members notice that in the event of a failure to comply with the requirements of that

order, they would be obliged to show cause why they should not be adjudicated in contempt for such failure. The order went even further than required by alerting the council members beforehand as to the precise sanctions that would be imposed in the event of noncompliance. Though the council members were not then defendants in the litigation, as officers of the defendant City, *see* N.Y. Pub. Off. Law § 2 (McKinney 1988), they were bound by that order and all of the injunction orders issued against the City, *see* Fed. R. Civ. P. 65(d), even without notice of them, *Dole Fresh Fruit Co. v. United Banana Co.*, 821 F.2d 106, 109 (2d Cir. 1987). In any event, the District Court required the City to post the July 26 order conspicuously, and none of the council members contends that he was not aware of its requirements.

Each council member appeared with counsel, and each was accorded an opportunity to present evidence and legal argument. The need for the plaintiffs to present evidence to sustain their burden of proof was obviated by the City's representation, undisputed by any of the four council members, that each had voted against the resolution of intention at the August 1 meeting of the City Council. As to the alleged lack of precision as to the precise order violated, the District Court's oral and written rulings specify that the council members are adjudged in contempt for violation of the July 26 order. Defendants contend that they are uncertain whether they have been cited for failing to vote in favor of the Affordable Housing Ordinance or for voting against the resolution of intention to adopt that ordinance. The action required of them by the July 26 order was to vote in favor of the Affordable Housing Ordinance. They failed to do so on August 1 and were found to be in contempt for that failure. The resolution of intention was a device offered by the District Court as a means of satisfying the July 26 order while still observing the notice and hearing time requirements of state law. The vote against that reso-

lution was clear evidence that the four council members were unwilling to obey the requirements of the July 26 order.

Of more substantial concern is the complaint that counsel were given inadequate time to present a defense. We are not persuaded by the District Court's point that the order of July 26 provided the council members time to retain counsel and time for counsel to become prepared in the event that noncompliance occurred on August 1. A council member is not obliged to retain counsel in advance of the occasion when his action may subject him to contempt, especially in the circumstances of this case, where the affirmative vote of any one of the four council members would have meant that none faced contempt.

We think it would have been preferable, even in the face of the protracted defiance demonstrated on this record, for the District Court to have accorded counsel at least a few days to prepare their defenses. Nevertheless, we see no basis for concluding that the promptness of the adjudications warrants setting them aside. None of the four contemnors sought the opportunity that was afforded them of pursuing an evidentiary hearing. There were no factual disputes to be resolved. Counsel were impaired, at most, in their ability to develop their contentions of law. Since, as will appear, we agree that all such contentions, now fully briefed and argued, are without merit, it would be idle to return the matter to the District Court to renew rulings that we are today holding were entirely correct.

2. *Abuse of Discretion*

In different ways the council members contend that the District Court exceeded its discretion in adjudicating them in contempt. One argument is that the Court on July 26 should not have directed the council members to vote for the Affordable Housing Ordinance once the Council had defeated an earlier resolution of intention on June

28. Another argument is that once the vote of August 1 occurred, the Court should not have adjudicated the council members in contempt. Underlying both arguments is the contention that a less confrontational resolution of the matter could have been achieved had the District Court selected the alternatives of either appointing a commission to exercise the Council's housing and related powers or ordering the Affordable Housing Ordinance into effect.

These arguments blend two somewhat different propositions of law, but in the end, both are unavailing. In challenging the District Court's decision to require the Council to enact the Affordable Housing Ordinance, the contemnors are alleging an abuse of discretion in the Court's choice of remedies for the constitutional violations adjudicated in 1986. As the contemnors point out, a District Court, though endowed with broad discretion in fashioning remedies for constitutional violations, *see Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), must exercise restraint in determining what actions ought to be required of state and local governmental officials. *See Rizzo v. Goode*, 423 U.S. 362, 380 (1976); *Toussaint v. McCarthy*, 801 F.2d 1080 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 2462 (1987); *Ruiz v. Estelle*, 679 F.2d 1115 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983). In challenging the District Court's decision to impose coercive contempt sanctions, the contemnors are alleging an abuse of discretion in the Court's method of enforcing the remedy that had been selected. Though there is no question that courts have authority to enforce their lawful orders through civil contempt, *Shillitani v. United States*, 384 U.S. 364, 370 (1966), the contemnors properly point out that in selecting contempt sanctions, a court is obliged to use the " 'least possible power adequate to the end proposed.' " *Id.* at 371 (quoting *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 61, 69 (1821)).

In this case, however, there is a fundamental reason why the choice of implementing legislation as a remedy and the choice of coercive contempt sanctions to enforce compliance with that remedy cannot possibly be an abuse of the District Court's discretion. That reason is the blunt fact that the City agreed in the Consent Judgment to comply with the Housing Remedy Order by the adoption of necessary implementing legislation, specifically including tax abatements and zoning changes. By its approval of the Consent Judgement the City Council itself selected the remedy of implementing legislation and cannot complain that the District Court approved the agreement. Moreover, once committed by its own agreement to adopting implementing legislation, the Council cannot complain that its obligation is enforced by the coercive sanctions of civil contempt. Consent judgments are important devices for resolving difficult controversies. Their effectiveness depends on the ability of all concerned to rely on the enforcement of their terms. In the context of a consent judgment, use of civil contempt sanctions is the "least possible power *adequate* to the end proposed" because faithful performance of the agreement is precisely the end proposed.

To the extent that the council members are contending that the District Court exceeded its discretion in ordering them to adopt the precise terms of the Affordable Housing Ordinance, this argument also is unavailing. The Consent Judgment had obliged the City not only to enact implementing legislation but to furnish within three weeks a long-term plan spelling out the details on matters left unresolved in the consent judgment. Upon the City's default of that obligation, the District Court was fully entiled to proceed with efforts to formulate a long-term plan. The Court proceeded cautiously, according the City a full opportunity to draft the plan and ultimately accepting nearly everything that the City proposed. Similarly, with the specifics of the Affordable Housing Or-

dinance, the District Court afforded the City the opportunity to have its consultants draft the ordinance and accepted the draft they produced. By ordering passage of the Affordable Housing Ordinance, the District Court was carrying out the terms of the Consent Judgment under which the City agreed to adopt implementing legislation on tax abatements and zoning changes and doing so with details supplied by the City itself. The order of July 26 was well within the discretion of the District Court, as was its decision to enforce that order by civil contempt sanctions.

3. *State Law Obligation*

Council member Chema contends that the order of July 26 cannot be enforced by contempt sanctions because it violates state law requiring notice and hearing of proposed changes in zoning ordinances. N.Y. Gen. City Law § 83 (McKinney 1968). The argument is unavailing. In the first place, the supremacy of federal law, including federal court orders to implement remedies for federal constitutional and statutory violations, prevails over conflecting state laws. *See Cooper v. Aaron*, 358 U.S. 1 (1958). Moreover, the District Court made clear in its letter to counsel of July 28 that the order of July 26 would be satisfied if the Council "adopts a resolution committing itself to enact the Affordable Housing Ordinance within the minimum time prescribed for notice pursuant to state law." This alternative means of compliance with the July 26 order was reiterated in the August 2 hearing at which the council members were adjudicated in contempt.

It may be contended that by requiring a resolution of intention by August 1, prior to the August 15 hearing on the Ordinance, the District Court was observing the notice requirement of state law but overriding the substance of the hearing requirement by ordering the Council to commit itself to an Ordinance before it had the

benefit of input from the public. We do not understand the District Court to have simultaneously permitted time for the public hearing and also precluded consideration of its results. Obviously, the basic issue of adopting an ordinance that implemented the Housing Remedy Order, the Consent Judgment, and the Long Term Plan Order had been determined and would not be open for reconsideration as a result of the public hearing. To that extent, the state law hearing requirement was properly overridden by paramount federal law. But there is no reason to believe that the District Court intended to bar consideration by the Council of useful suggestions tendered at the public hearing that might improve specific provisions of the Affordable Housing Ordinance. The hearing would still be useful to the extent that it generated suggestions not inconsistent with achieving the basic objectives of the remedial orders that had been entered. The Council has at all times been free to seek modification of the terms of the proposed ordinance, which the City's consultants drafted, but no such request has been made. Finally, we note that after the public hearing was held on August 15, the four individual contemnors again voted against the Affordable Housing Ordinance.

4. *Legislative Immunity*

The major defense asserted by the council members is that they are entitled to legislative immunity and that such immunity prohibits a district court from compelling them to vote in favor of a particular ordinance. There is no doubt that state legislators enjoy immunity when engaged "in the sphere of legitimate legislative activity." *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951); *see Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. 719, 731-23 (1980). The Supreme Court has extended such immunity to "regional legislators," *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), but has expressly

left open the question whether such immunity extends to "individuals performing legislative functions at the purely local level," *id.* at 404 n.26. Prior to *Lake Country Estates*, a number of circuits had denied immunity to local legislative officials, *see Williams v. Anderson*, 562 F.2d 1081, 1101 (8th Cir. 1977) (school board members); *Jones v. Diamond*, 519 F.2d 1090, 1101 (5th Cir. 1975) (county supervisors); *Curry v. Gillette*, 461 F.2d 1003, 1005 (6th Cir.) (alderman), *cert. denied*, 409 U.S. 1042 (1972); *Progress Development Corp. v. Mitchell*, 286 F.2d 222, 231 (7th Cir. 1961) (village board of trustees); *Cobb v. City of Malden*, 202 F.2d 701, 706-07 (1st Cir. 1953) (Magruder, C.J., concurring) (city councilmen), but after the Supreme Court extended immunity to regional legislators, seven circuits ruled that similar immunity is available to local legislators, *see Aitchison v. Raffiani*, 708 F.2d 96, 98-100 (3d Cir. 1983); *Reed v. Village of Shorewood*, 704 F.2d 943, 952-53 (7th Cir. 1983); *Espanola Way Corp. v. Meyerson*, 690 F.2d 827 (11th Cir. 1982), *cert. denied*, 460 U.S. 1039 (1983); *Kuzinich v. County of Santa Clara*, 689 F.2d 1345, 1349-50 (9th Cir. 1982); *Hernandez v. City of Lafayette*, 643 F.2d 1188, 1193-94 (5th Cir. Unit A 1981), *cert. denied*, 445 U.S. 907 (1982); *Bruce v. Riddle*, 631 F.2d 272 (4th Cir. 1980); *Gorman Towers v. Bogoslavsky*, 626 F.2d 607, 611-14 (8th Cir. 1980).

Even if we assume for purposes of this appeal that city council members enjoy the same immunity available to state legislators, we would seriously doubt that such immunity insulates them from district court orders requiring them to comply with remedial decrees redressing constitutional violations. The Supreme Court has instructed a district court that, if necessary to secure compliance with a prior federal court remedial decree, it could order county legislators "to exercise the power that is theirs to levy taxes" to reopen the public schools of Prince Edwards County, Virginia. *Griffin v. County*

School Board, 377 U.S. 218, 233 (1964). Though appellants minimize the force of this instruction by calling it dictum, since the need to issue such an order had not then arisen, it is especially forceful dictum when the Supreme Court specifically informs a district court what action it may take in the course of significant litigation. If it had become necessary to order the county legislators to levy taxes, there can be no doubt that the Supreme Court expected the district court to make sure that its order was enforced.

The Supreme Court has also upheld a district court's remedial order that required state and local officials to provide necessary public funds to implement a school desegregation plan. *Milliken v. Bradley*, 433 U.S. 267 (1977). In *Milliken* the Court expressly rejected an immunity defense based on Eleventh Amendment sovereign immunity—a claim at least as substantial as the immunity defense now asserted by the four council members. The Court pointed out that though a state enjoyed immunity from damage actions, its immunity did not insulate it from a district court judgment requiring prospective action to comply with constitutional requirements, even when compliance would have "a direct and substantial impact on the state treasury." *Id.* at 289. *See also Edelman v. Jordan*, 415 U.S. 651 (1974). This Court has also approved an order of a district court compelling a city's legislative body to vote in favor of funds required to secure compliance with court-ordered remedies for constitutional violations. *Arthur v. Nyquist*, 712 F.2d 809 (2d Cir. 1983), *cert. denied*, 466 U.S. 936 (1984). *See also United States v. City of Parma, Ohio*, 661 F.2d 562 (6th Cir. 1981) (requiring enactment of city ordinance), *cert. denied*, 456 U.S. 926 (1982).

Indeed, in one of the cases cited to us in support of legislative immunity, *Star Distributors, Ltd. v. Marino*, 613 F.2d 4 (2d Cir. 1980), we expressly distinguished

litigation in which a state legislature had been enjoined "from continuing its defiance of federal court desegregation orders." *Id.* at 10 (citing *Bush v. Orleans Parish School Board*, 191 F. Supp. 871 (E.D. La.) (three-judge court), *aff'd sub nom. Denny v. Bush*, 367 U.S. 908 (1961)). The three-judge court in *Bush* had rejected the defense of legislative immunity on the ground that the Louisiana legislature was acting in an administrative capacity, *see Bush v. Orleans Parish School Board*, 188 F. Supp. 916, 922 (E.D. La. 1960) (three-judge court), *aff'd*, 365 U.S. 569 (1961), but our discussion of the *Bush* litigation in *Star Distributors* makes it clear that we did not consider legislative immunity to be a defense to orders issued "to vindicate the authority of a federal court." 613 F.2d at 10.

On this appeal, however, we need not definitively decide whether as a general matter a district court may order city council members to vote in favor of a particular ordinance, even to implement remedies for constitutional violations. This appeal presents the more narrow issue whether such an order may be entered and enforced by contempt sanctions after a city has agreed to entry of a consent judgment committing itself to enact implementing ordinances and a city's legislative body has voted in favor of such a consent decree. On that narrow issue, we have no doubt that federal court authority must prevail. No litigant, least of all public officials sworn to uphold the Constitution of the United States, may be permitted to avoid compliance with solemn commitments they have made in a consent judgment entered by a federal district court to remedy constitutional violations. Without intending to cast doubt on a district court's authority to order legislative action in contested litigation concerning the appropriate choice of remedies for constitutional violations, we note that the Supreme Court has recently observed that consent judgments may contain enforceable obligations that might have been beyond

the authority of a district court to enter in contested litigation. *See Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986).

Nor is there any merit in appellant Spallone's suggestion that he may not be required to implement the Consent Judgment because he voted against its approval as a member of the City Council. A federal court must be able to rely upon the assurances given by municipalities and their legislative bodies, without regard to the dissenting votes of individual local officials. Once the Yonkers City Council approved the terms of the Consent Judgment, the Council became obligated to carrying out its commitments. If a member of the Council is unwilling to abide by such commitments, his option is to decline to serve on the body that is bound, not to act in defiant disregard of the commitments and the federal court judgment that memorializes them.

Whatever the scope of local legislators' immunity, it does not insulate them from compliance with a consent judgment to which their city has agreed and which has been approved by their legislative body.

5. *First Amendment*

The council members' assertion of a First Amendment defense to the July 26 order and its enforcement requires no extended discussion. Even if we acknowledge that the act of voting has sufficient expressive content to be accorded some First Amendment protection as symbolic speech, the public interest in obtaining compliance with federal court judgments that remedy constitutional violations unquestionably justifies whatever burden on expression has occurred. *See United States v. O'Brien*, 391 U.S. 367 (1968). The council members remain free to express their views on all aspects of housing in Yonkers. But just as the First Amendment would not permit them to incite violation of federal law, *see Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam); *Dennis v.*

United States, 341 U.S. 494 (1951), it does not permit them to take action in violation of such law.

B. *The City*

To the extent that the City advances the same objections as the council members, particularly the contention that the District Court should have chosen to adopt the Affordable Housing Ordinance itself or to appoint a commission to exercise the City's housing functions, we need not repeat our reasons for rejecting those objections. Three contentions, however, require further discussion.

1. *Defense of Impossibility*

The claim most vigorously pressed by the City is the defense of impossibility. The City contends that enactment of the Affordable Housing Ordinance requires an affirmative vote of a majority of the City Council and that the City, as a corporate entity, is powerless to compel the council members to act. We recognize that civil contempt sanctions may not be imposed upon a person or entity unable to comply with a court's orders. *See Shillitani v. United States*, *supra*, 384 U.S. at 371; *Maggio v. Zeitz*, 333 U.S. 56, 76 (1948). Nevertheless, we conclude that the City's defense of impossibility is unavailing.

Preliminarily, we have some doubt whether the City has done everything it can, apart from securing the favorable votes of a Council majority, to obtain compliance with the orders of the District Court. The City has not requested the Governor of New York to use whatever authority he may have to remove local officials for misconduct, nor has the City requested the New York Emergency Financial Control Board for the City of Yonkers to take whatever action its broad authorizing statute permits it to take under the current circumstances, 1984 N.Y. Laws ch. 103.

More fundamentally, we agree with the position urged by the United States that the City cannot view itself as an entity separate from the City Council for purposes of complying with the Consent Judgment. The City bound itself to take necessary legislative action when it agreed to the Consent Judgment, which explicitly calls for implementing legislation. Having made that commitment, the City may properly be subjected to the coercive force of civil contempt sanctions until compliance with its commitment occurs. The suggestion that the administrative officials of the City are willing to comply but cannot take legislative action conjures up a scheme of separated powers that does not obtain in Yonkers. For purposes of taking official governmental action, the City of Yonkers is the City Council and vice versa. The Council sets municipal policy, *see Pembaur v. City of Cincinnati*, 475 U.S. 469, 481 (1986) ("where action is directed by those who establish governmental policy, the municipality is equally responsible" with city's authorized decisionmakers), it appoints and can replace the city manager, and it is the principal agency of governance for the City. There is not even a separately elected executive authority. The mayor is a council member elected to the Council in a citywide election; the other council members are elected from districts. Under the circumstances of this case, the Council's defiance of the Consent Judgment and the implementing orders of the District Court is the defiance of the City, and the City, along with the defiant council members, may be subject to civil contempt sanctions. As the Supreme Court has observed, "If a state agency refuses to adhere to a court order, a financial penalty may be the most effective means of insuring compliance." *Hutto v. Finney*, 437 U.S. 678, 691 (1978). The same may be said of a city.

The City futher contends that even if it can legally be held in civil contempt because of the violation of the July 26 order, it was an abuse of discretion to do so

under the circumstances here presented, especially since the District Court had available the alternative of ordering the Affordable Housing Ordinance into effect. We conclude, however, that the District Court neither erred as a matter of law nor exceeded its permissible discretion by using contempt sanctions to coerce the City to fulfill commitments that it had undertaken in the Consent Judgment or by determining that such sanctions were necessary to achieve enactment of the Ordinance.

2. *State Law Objection*

The City asserts a state law objection different from the council members' claim concerning notice and hearing requirements for zoning changes. The City contends that it lacks the authority under state law to grant the tax abatements required by the Long Term Plan Order. It acknowledges some authority to grant tax abatements, *see* N.Y. Real Prop. Tax Law § 421-c (McKinney 1984), but contends that the Long Term Plan Order requires tax abatements permissible only for cities of more than one million population, *id.* § 421-a(2)(a).

We cannot be certain whether the District Court, in issuing the Long Term Plan Order, intended to override state law in the belief that the specified tax abatements were necessary to remedy the violations that have occurred or intended to require only those tax abatements consistent with state law. The Court clearly had the power to override state law to implement its judgment, but we are not certain that it intended to use such power. We need not resolve the uncertainty at this time, however, because the City's challenge is to the provisions of the Long Term Plan Order, not the Affordable Housing Ordinance, which is the subject of the pending contempt adjudication. The Ordinance refers to tax abatements but does not implement them. *See* proposed Affordable Housing Ordinance § 2(a) n.*. Under the circumstances, we will not disturb the contempt adjudication but will

grant leave to the City to seek clarification from the District Court whether it intends to order tax abatements that override state law or only such abatements as are consistent with state law.

3. *The Amount of the Monetary Sanctions*

The City contends that the amount of the coercive fines imposed as a remedial sanction for civil contempt is excessive and a violation of the Due Process Clause of the Fifth Amendment and the Excessive Fines Clause of the Eighth Amendment. The fines start at $100 a day and double each day of continued noncompliance. As a result of doubling, the fine exceeds $100,000 for day 15, exceeds $1 million for day 21, and exceeds $1 billion for day 25.

The Supreme Court has stated that the Eighth Amendment is "designed to protect those convicted of crimes." *Ingraham v. Wright*, 430 U.S. 651, 664 (1977). More recently the Court has raised the possibility that the Amendment might have some application beyond the criminal context: the Court characterized as a "cognizable constitutional challenge" a claim that the Excessive Fines Clause applies to the amount of punitive damages that may be awarded in civil cases, *Bankers Life and Casualty Co. v. Crenshaw*, 108 S. Ct. 1645, 1650 (1988), but declined to decide the issue because it had not been preserved for review as a federal question, *id.*

Even if the Excessive Fine Clause should be determined to apply to punitive damages, it does not apply to civil contempt sanctions imposed to obtain compliance with court orders. We have already held that the Cruel and Unusual Punishments Clause does not apply to coercive imprisonment imposed as a civil contempt sanction. *United States v. Dien*, 598 F.2d 743, 745 (2d Cir. 1979), and the reasoning of *Dien* applies to the Excessive Fines Clause. Both clauses apply to sanctions im-

posed to punish past conduct, not to sanctions imposed to secure prospective compliance.

The inapplicability of the Excessive Fines Clause, however, does not mean that civil contempt sanctions are subject to no limitation. The Due Process Clause is an arguable limitation, though it is debatable whether a person has been "deprived" of property within the meaning of the Fifth Amendment when that person always has the option of complying with the order of the court and thereby terminating the obligation to pay the coercive fine. In any event, the law of contempt itself exerts some outer limits on the normally "wide discretion" of a district court to fashion appropriate remedies to secure compliance with its lawful orders. *See Vuitton et Fils S.A. v. Carousel Handbags*, 592 F.2d 126, 130 (2d Cir. 1979). *See also Perfect Fit Industries, Inc. v. Acme Quilting Co.*, 673 F.2d 53, 57 (2d Cir.) (level of corporate profits relevant in determining whether coercive fine is "confiscatory"), *cert. denied*, 459 U.S. 832 (1982).

The fact that a coercive monetary sanction requires payment of a large daily fine does not necessarily render that sanction beyond the discretion of a district court. The Supreme Court has itself selected as an appropriate sanction a coercive fine of $2,800,000 (in 1947 dollars) to be imposed upon a union if it shouild fail to comply with a district court order within five days. *United States v. United Mine Workers*, 330 U.S. 258, 305 (1947). We have declined to disturb by mandamus the imposition of a coercive fine that started and remained constant at the level of $150,000 per day. *International Business Machines Corp. v. United States*, 493 F.2d 112 (2d Cir. 1973), *cert. denied*, 416 U.S. 995 (1974).

The City of Yonkers has an annual budget of $337 million. The need for a substantial daily fine to coerce compliance is demonstrated by the City's announcement to the District Court of its willingness to pay $30 million

to be relieved of its commitment to build the 200 units of public housing. Obviously, the City believes that there is a price it is willing to pay to avoid compliance with the orders of the District Court. The District Court was entitled to establish a schedule of fines that would secure compliance with its orders, and under the circumstances of this case that schedule would have to reach, without undue delay, a cumulative fine significantly above the price the City was willing to pay for noncompliance. The Court acted well within its discretion in starting the fine schedule at $100 a day. The Court also was entitled within reasonable limits to double the amount of the fine for each day of continued defiance. At that rate the cumulative fine after seven days, when we issued our stay, was $12,700. At some point, however, the doubling reaches unreasonable proportions. Under the current schedule the fine for day 25 is more than $1 billion; the fine for day 30 is more than $50 billion.

We believe that the doubling exceeds the bounds of the District Court's discretion when the level of each day's fine exceeds $1 million. The present schedule calls for a fine of more than $800,000 on day 14. We will therefore modify the contempt sanction against the City to provide that the fine shall be $1 million per day on day 15 and $1 million per day for every subsequent day of noncompliance.

Conclusion

We affirm the contempt sanctions against the four council members, Spallone, Chema, Longo, and Fagan. We modify the contempt sanction against the City of Yonkers so that the fine is $1 million per day on day 15 and $1 million per day for every subsequent day of noncompliance, and we affirm the sanctions against the City, as modified. We deny the pending motion to stay the District Court's order of July 26. We direct that issuance of our mandate be stayed for seven days from the date of this decision to permit application to the

Supreme Court or a Justice thereof for a stay of the contempt sanctions pending filing and consideration of a petition for a writ of certiorari. Unless a stay is granted by the Supreme Court or a Justice thereof, our mandate shall issue seven days from the date of this decision and our prior stay of the contempt sanctions shall at that time be vacated. On the date our mandate issues, the fines against each of the four council members shall resume at the level of $500 per day and, if noncompliance continues, each shall be imprisoned, pursuant to paragraph 5 of the Order of July 26, two days after the date our mandate issues. Since our stay entered on August 9 and the District Court's Order directed imprisonment to occur on August 11, it is appropriate to adjust the incarceration timetable in light of the interval between the issuance of our stay and the vacation of that stay upon issuance of our mandate. Also on the date our mandate issues, the fines against the City shall resume at the level for day 8 of the schedule resulting from the District Court's Order of July 26 and, if noncompliance continues, shall double until day 14, shall be $1 million on day 15, and shall be $1 million per day for every subsequent day of noncompliance.

Affirmed as to the council members; affirmed, as modified, as to the City.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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80 CIV 6761 (LBS)

UNITED STATES OF AMERICA,
Plaintiff,

-and-

YONKERS BRANCH-NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,
Plaintiff-Intervenor,

-against-

YONKERS BOARD OF EDUCATION; CITY OF YONKERS; and YONKERS COMMUNITY DEVELOPMENT AGENCY,
Defendants.

FIRST REMEDIAL CONSENT DECREE IN EQUITY

The following sets forth certain agreements of the parties to this litgiation, and certain actions which the City of Yonkers (the "City") will take in connection with a consensual implementation of Parts IV and VI of this Court's Housing Remedy Order (the "HRO") entered on May 26, 1986. Accordingly, the parties agree as follows:

Public Housing

SECTION 1. The City acknowledges its continuing commitment to the construction of the 200 units of public housing made available by the United States Department of Housing and Urban Development ("HUD") pursuant to the consent decree of March 19, 1984 between HUD and plaintiff-intervenor.

SECTION 2. The City agrees to provide the sites referred to below in this Section under the caption "Sites" for the location of a total of 200 units of public housing referred to in Section 1. The number of such units to be located on each site is not to exceed the number set forth under the caption "Maximum Density" opposite each site.

Sites	Maximum Density
Whitman School (north-west field)	40
Lincoln School (lower field)	48*
School 4	24
Helena Avenue	22
Wrexham Road	30
Clark Street	20
Valentine Street	16

SECTION 3. (a) The City shall have the right to submit no later than ten days after the date of this decree a maximum of two additional sites acceptable to HUD to be used for the location of a portion of the 200 units of Public Housing referred to in Section 1.

(b) If the City avails itself of the right to submit additional sites as set forth in paragraph (a), the City shall also submit to the Court a proposed amendment to Section 2 hereof, setting forth an expanded list of sites and their respective "Maximum Densities", provided that the Maximum Density of no site shall be fewer than 12 units.

(c) Upon approval by the Court, the proposed amendment to Section 2 shall have the same effect as if fully set forth herein at this time.

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* If HUD does not approve this proposed density for the Lincoln School site, the densities at other approved sites will be appropriately adjusted.

(d) The City acknowledges and understands that, if no additional sites are proposed by it and approved by the Court, the 200 units of public housing shall be located on the sites and in the densities currently set forth in Section 2.

SECTION 4. On or before the later of fifteen days from (i) the date of this decree or (ii) the date of any approval by the Court of an amended Section 2 (as contemplated by Section 3(c) hereof), the City shall make (or shall cause to be made) fair market value offers to purchase from their respective owners such private sites as are set forth in Section 2 (as theretofore amended). Such offers shall also advise the respective owners that, in the absence of a voluntary agreement for the purchase by (or on behalf of) the City, the City will commence (or will cause to be commenced) legal proceedings to secure control over the relevant site in the most expeditious manner, including the use of the power of eminent domain.

SECTION 5. On or before 60 days of the date of this decree, the City will have (i) concluded negotiations with, and will have acquired title from, owners of private sites willing to sell their respective properties to the City on mutually agreed upon terms or (ii) commenced eminent domain proceedings against owners of private sites who have been theretofore unwilling voluntarily to sell their respective properties.

SECTION 6. On or before 80 days from the date of this decree, the City shall have caused the Municipal Housing Authority ("MHA") to prepare a request for proposals ("RFP") from developers for the construction of 200 units of Public Housing to be located as provided in Section 2. The parties agree that they will cooperate in good faith with each other, the MHA and HUD to insure that the preliminary steps in the preparation of a final RFP (including (i) the preparation of preliminary

site reports for all sites (which shall be prepared at the City's expense subject to a reimbursement from HUD, if HUD approves the development proposal), (ii) the subsequent review of such site reports by HUD, (iii) any conferences required to agree on appropriate language for the RFP, and (iv) the drafting of the final RFP) can be completed within the time limitation set forth in this Section.

SECTION 7. (a) On or before the later of (i) 10 days after having acquired site control over all the sites referred to in Section 2 or (ii) the time limitation set forth in Section 6, the City shall cause the MHA to publish at the City's expense the RFP referred to in Section 6 in a manner reasonably calculated to insure that the RFP is broadly disseminated to developers doing business in the Yonkers area. The methods of publication shall include (without limitation) advertisements in *The New York Times* and another newspaper of general circulation in the Yonkers area, direct mailings to specific developers, and periodic advertisements in no fewer than two trade magazines identified by the OHA, and shall otherwise conform to HUD Handbook 7417.1 REV-1 (October 1980) ¶ 6-39(b).

(b) The publication referred to in paragraph (a) shall be made at least once each week for two consecutive weeks.

SECTION 8. The review of developers' proposals shall begin 55 days after the date on which the RFP is first published. The MHA shall complete such review within 20 days and submit its selection to HUD immediately thereafter for HUD's review according to HUD's procedures. Construction shall begin as promptly as practicable following HUD's approval of the development proposal.*

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* The parties acknowledge that HUD's processing time for such approval is 50 days. The parties understand that HUD will expedite the approval process if possible.

SECTION 9. The City will fully and in good faith cooperate with all persons, parties, and organizations the involvement of which is necessary or desirable for the completion of the process contemplated hereinabove.

SECTION 10. The City agrees that, to the extent it relates to the City's obligation to provide sites for the placement of 200 units of public housing, it will seek no further appellate review of the decision of this Court entitled *United States of America et al v. Yonkers Board of Education et al.*, 624 F.Supp. 1276 (S.D.N.Y. 1985) or of any subsequently entered decree. The City acknowledges that if any subsequent appellate ruling (whether such ruling had been prosecuted by the City or any other party to this litigation) were to nullify or in any way weaken the constitutional or statutory basis of the City's obligation to provide such sites (as found by the Court in the opinion above), the City would, nevertheless, be required by this Decree on Consent fully to discharge such obligations as set forth herein.

SECTION 11. The parties acknowledge that HUD has not heretofore given its final approval for the sites and densities set forth in Section 2 or for any final development plans for such sites and that, in accordance with the Consent Decree dated March 19, 1984, HUD may disapprove specific proposals that fail to meet applicable standards for approval.

Assisted Housing

SECTION 12. The City acknowledges that a long-term goal (the "Goal") of 800 units of assisted housing (the "Units") is an appropriate target in fulfilling its obligations pursuant to Part VI of the HRO. The City will, subject to the terms hereof, make good faith efforts to take such steps as are required to achieve said Goal on or before June 30, 1992 and to achieve benchmarks of 200, 400, and 600 Units on or before the first, second,

and third anniversaries, respectively, of the adoption of Mandated Incentives (as contemplated in Section 17).

SECTION 13. (a) There shall be a presumption in favor of allowing two years for the Mandated Incentives to demonstrate their effectiveness in fostering the development of a sufficient number of Units timely to achieve the Goal without the adoption of additional remedial measures.

(b) Notwithstanding paragraph (a), after the first anniversary of the adoption of Mandated Incentives, plaintiff or plaintiff-intervenor may move the Court for an order directing the City to take additional remedial measures if the movant satisfies the burden of overcoming the presumption referred to in paragraph (a) by clear and convincing evidence that the Mandated Incentives are insufficient timely to achieve the Goal.

(c) If, on or after the second anniversary of the adoption of Mandated Incentives (or at such earlier date as provided in paragraph (b)), the 400-Unit benchmark referred to in Section 12 has not been met, the plaintiff or the plaintiff-intervenor may apply to this Court for an order requiring the City to adopt additional or substituted remedial measures to insure that the Goal will be timely met.

(d) The City acknowledges that the additional or substituted remedial measures which the Court may require it to adopt as provided herein may include the requirement that the City issue (or cause to be issued) RFPs for the construction of multi-family housing (to include Units) on city-owned land. The City acknowledges further that it would be within the power and jurisdiction of the Court to require such use of city-owned land.

SECTION 14. The parties agree that the Units shall be provided only in conjunction with, or as a part of,

housing developments containing units to be offered for sale or rental at market rates.

SECTION 15. The parties agree that, pursuant to Section 12, no fewer than (a) 100 Units shall be provided on terms affordable to families earning no more than 50 percent of the median income in the New York Metropolitan Area; (b) 300 Units shall be provided on terms affordable to families earning no more than 80 percent of the median income in such Area; (c) 300 Units shall be provided on terms affordable to families earning no more than 100 percent of the median income in such Area; and (d) 100 Units shall be provided on terms affordable to families earning no more than 120 percent of the median income in such Area.

SECTION 16. This decree shall impose on the City no obligation with respect to city-owned property, except as contemplated by Section 2 and 13 and previously issued orders of this Court.

SECTION 17. The City agrees to adopt, among other things, legislation (a) conditioning the construction of all multi-family housing (inclusive of projects for future construction currently in the planning stage but which will require zoning changes, variances, special exceptions, or other discretionary approvals from the City to begin construction) on the inclusion of at least 20 percent assisted units; (b) granting necessary tax abatements to housing developments constructed under the terms of the legislation referred to in clause (a); (c) granting density bonuses to such developers; (d) providing for zoning changes to allow the placement of such developments, provided, however, that such changes are not substantially inconsistent with the character of the area; and (e) other provisions upon which the parties may subsequently agree (including the use of the Industrial Development Authority as a development vehicle and the creation of a municipally-designated, independ-

ent not-for-profit Local Development Corporation) (collectively, the "Mandated Incentives"). The City agrees to implement a package of Mandate Incentives as promptly as practicable but, in no event, later than 90 days after the entry of this decree.

SECTION 18. (a) The parties acknowledge that certain issues remain to be agreed upon. These issues include, without limitation, the appropriate percentage configuration (as between assisted- and market-rate units) of the relevant housing developments; the appropriate share of Units devoted to rental or to ownership; the appropriate resale limitations for Units allocated to ownership; the implementation of other financial mechanisms to facilitate the provision of Units or to make them more widely affordable; the appropriate disposition of such funds as are deposited in the AHTF; the steps which the City may take to make the use of "section 8 certificates" more widely available; and the possibility of a reduction in the Units to be made available at prices affordable by the income groups referred to in clauses (b) and (c) of Section 15 if the City were to secure the placement of units of assisted housing in certain housing developments currently under consideration in the City.

(b) The parties agree that they will work diligently to agree on such subsidiary issues and submit to the Court on or before February 15, 1988 a Second Remedial Consent Decree setting forth any understandings with respect to such matters.

SECTION 19. If in the view of any party there exists a problem or obstacle to the full or timely implementation of this decree, any party may bring such issue before this Court for resolution.

SECTION 20. Plaintiff-intervenor or the City may assert before this Court such rights it may have to challenge the discretionary decisions which HUD may make in making available the 200 units of public housing

which are the subject of this decree, including any decision not to waive the Total Development Cost cap.

Dated: January 28, 1988

Plaintiff,
The United States of America

By: /s/ Brian Heffernan
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Civil Rights Division
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The City of Yonkers
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Development Agency

SO ORDERED:

/s/ Leonard B. Sand
LEONARD B. SAND, U.S.D.J.

Dated: January 28, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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80 CIV 6761 (LBS)

UNITED STATES OF AMERICA,
Plaintiff,

and

YONKERS BRANCH—NAACP, *et al.*,
Plaintiffs-Intervenors,

v.

YONKERS BOARD OF EDUCATION, *et al.*,
Defendants.

LONG TERM PLAN ORDER

Section 17 of the First Remedial Consent Decree in Equity (the "First Decree") requires the City of Yonkers to take certain actions with respect to the long term housing plan (the "Long Term Plan") required by Section VI of this Court's May 26, 1986 Housing Remedy Order. Section 18 of the First Decree further contemplates that the parties may reach an understanding with respect to certain issues relating to the implementation of the long-term Goal [1] and shall set forth such understanding in a Second Remedial Consent Decree to be presented to the Court.

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[1] All capitalized terms not herein defined are used as defined in the First Decree. Housing- and zoning-related capitalized terms (not defined herein or in the First Decree) used in Sections 2 and 8 hereof are used as defined in Chapter XVII of the Code of the City of Yonkers.

The City has failed to take those actions which are the subject of Section 17 of the First Decree. The City has further informed the Court and the parties that it will not negotiate toward reaching an understanding on certain other Long Term Plan issues, as required by Section 18 of the First Decree. In light of these actions of the City of Yonkers, plaintiff and plaintiff-intervenors have jointly submitted a Long Term Plan proposal for the Court's consideration, accompanied by their joint amended Long Term Plan comments and a joint motion for this Court to enter their proposal. Having reviewed these submissions, and the response of the City thereto, the Court hereby enters the following Order with respect to the Long Term Plan:

It is hereby ORDERED, ADJUDGED and DECREED:

SECTION 1. *Number and Distribution of Assisted Units.*

(a) Consistent with Section 17 (a) of the First Decree, the City shall condition the construction of any multifamily housing development (as defined in Section 17(a) of the First Decree and Section 2 below) on the inclusion of a number of assisted units in such development equal to 20 percent of the maximum aggregate number of units authorized for construction in such development. In instances where the existing zoning already permits a density of sixty (60) units per acre or more, the number of assisted units can be limited to 10 percent or more of the total number of units in the development, if the maximum density bonus that will then be given to the developer is not in excess of 50 percent over the permitted zoning. If the bonus sought is in excess of 50 percent over the permitted zoning, the 20 percent ratio shall apply.

(b) The total number of assisted housing units (calculated as provided in paragraph (a)) in each such multifamily housing development shall be allocated to

the income groups specified in Section 15 of the First Decree so that the number of assisted units respectively allocated (i) to households described in clause (b) of such Section does not exceed three times the number of assisted units allocated to households described in clause (a) of such Section; (ii) to households described in clause (c) of such section does not exceed the number of assisted units allocated to households described in clause (b) of such section; and (iii) to households described in clause (d) of such Section does not exceed one-third (rounded to the nearest whole number) of the number of assisted units allocated to households described in clause (c) of such Section. Notwithstanding the previous sentence, if the aggregate minimum number of assisted units to be allocated to any of the four income groups specified in Section 15 of the First Decree is attained before the minimum is reached for remaining groups, assisted units constructed thereafter shall be allocated (in the same proportion) only to income groups whose minimum has not theretofore been attained.

(c) The number of two-bedroom assisted housing units to be provided in each such housing development shall equal at least 60 percent of the total number of assisted housing units. At least 30 percent of the assisted units in each such housing development shall be three-bedroom units (or larger). Up to 10 percent of assisted units may be one-bedroom.

SECTION 2 *Target Areas.*

(a) The assisted housing requirement described in Section 1 above shall apply, until the Goal is reached, to multifamily housing (including apartment buildings, rowhouses or townhouses) located in zoning districts of East and Northwest Yonkers currently zoned MG, M, A, B and BA. In reviewing and approving development proposals, the Office of Implementation (see below) and the City shall seek, to the extent possible consistent with

the timetable and goals of this Order, to assure the provision of assisted housing in a dispersed manner and so to avoid the undue concentration of both public and assisted units in any neighborhood of Yonkers. Priority shall be given to Long Term Plan proposals which avoid such concentration.

(b) Such requirement shall also apply, until the Goal is reached, to multifamily housing (including apartments buildings, rowhouses or townhouses) built in any zoning district of East and Northwest Yonkers (not currently zoned MG, M, A, B or BA) where multifamily housing may hereinafter be built pursuant to rezoning, special exceptions or otherwise.

(c) Notwithstanding paragraphs (a) and (b) hereof and anything set forth in the First Decree, the City may exempt from such requirement any multifamily housing development of fewer than ten units; provided, however, that such exemption shall not be applied to circumvent (by, for example, artificially subdividing one housing development into several developments of fewer than ten units) this Plan's purpose of requiring that multifamily housing in East and Northwest Yonkers otherwise contain at least 20 percent of assisted units.

SECTION 3. *Affordability Criteria.*

The term "affordable", as used in Section 15 of the First Decree, means, with respect to each income category described in such Section, assisted housing units (i) sold at a price entailing a monthly carrying cost (assuming a 10 percent downpayment, a 30-year self-liquidating mortgage, and including principal and interest payments, property taxes, howeowners association fees, but excluding utilities) not exceeding at any time 28 percent of the annual gross income of the household occupying the assisted unit or (ii) rented at a rent (including an allowance for utilities) not exceeding at any

time 30 percent of the annual gross income of the household occupying the assisted unit.

SECTION 4. *Term; Transfer Restrictions and Occupancy Criteria.*

(a) Assisted housing units shall be rented or sold only to households meeting (at the time of rental or sale) the income qualifications contemplated in Section 15 the First Decree, as from time to time adjusted for the New York Metropolitan Area. Such units shall be the primary residence of the occupants.

(b) All assisted housing units subject to purchase shall have resale-price limitations (enforced by covenants running with the land, restrictions on registration of title, or any other appropriate legal mechanism approved by the City) which will ensure that for a period of thirty days from the time of their first sale such housing units are sold or resold only to, and at a price affordable to, a household which is, at the time of purchase, in the same income group (referred to in Section 15 of the First Decree and as at that time adjusted) as was the seller at the time such previous owner first occupied the unit. Such resale-price limitation may be amended by consent of the parties or motion to the Court if future experience with financing sources and/or income-qualified owners of assisted units should demonstrate the practical advisability of reformulating the applicable resale-price limitation.

(c) The owner of assisted housing units for rent shall be required to assure that, for a period of thirty years from the time of first rental, such units are affordable to, and are rerented only to, a household which is, at the time of re-rental, in the same income group (referred to in Section 15 of the First Decree and as at that time adjusted) as was the previous tenant at the time such previous tenant first occupied the unit. Assisted units for rental may be converted to units for sale subject,

however, to the same ownership eligibility standards as applicable to units for sale for the remainder of the thirty-year period from original occupancy referred to in the previous sentence.

(d) The affordability and other restrictions on resale and/or occupancy shall not apply to (i) the transfer of ownership of an assisted unit between spouses or former spouses ordered as a result of a judicial decree of divorce or separation agreement (not including transfers to third parties), (ii) the transfer of ownership of a unit between family members as a result of inheritance, and (iii) formerly HUD-insured multifamily projects which, following default on the mortgage, HUD acquires or is mortgagee in possession ("MIP"), to the extent that the provisions are inconsistent with applicable HUD statutes and regulations regarding management or disposition of HUD-owned projects or projects for which HUD is MIP; provided, however, that transfers to in clauses (i) and (ii) do not extinguish such restrictions (whatever be the legal mechanism through which the restrictions are enforced) which shall be fully complied with in the event of any subsequent sale or rental of a unit not specifically exempted hereby. An exempted transfer as heretofore provided in paragraph (d) shall not toll the running of the thirty-year period referred to in paragraph (b) hereof.

(e) This Section shall not be interpreted as in any way affecting or diminishing, and shall apply together with, occupancy criteria (to be applied in good faith by the City or each developer) substantially of the type set forth in 24 C.F.R. § 960.205 to ensure that the personal and financial background of each potential tenant or owner of assisted units will not be detrimental to the viability of the housing development.

(f) To the extent not inconsistent with other applicable occupancy and financial criteria, the City shall endeavor to give occupancy priority to:

1) persons who, between January 1, 1971 and the date assisted housing pursuant to this Decree is made available, have been residents of public or subsidized housing in the City or Yonkers. Such persons shall be given the first opportunity to apply for such housing, which opportunity shall be afforded up until thirty (30) days following the date the final assisted housing units pursuant to this Decree are made available. Occupancy choice from among such persons applying shall be on a first-come, first-served basis;

2) residents of the City of Yonkers; and

3) persons employed in the City of Yonkers.

(g) The Implementation Office (as defined in Section 11 below) shall be reasonable for pre-screening applicants who wish to occupy (as tenants or purchasers) assisted units and for maintaining a list of such pre-screened applicants. Owners or developers of housing projects containing assisted units may be allowed to select tenants or purchasers of assisted units from among the applicants pre-screened by such Office. The Implementation Office shall be responsible for monitoring the good faith application of any discretion vested in such owners or developers with respect to the choice of tenants or purchasers of assisted units.

(h) Within thirty (30) days of the date the Implementation Office assumes its responsibilities, it shall prepare occupant pre-screening procedures and criteria and submit the same to the Court and parties for review. The parties shall then meet, within 15 days thereafter, with a representative of the Implementation Office to attempt to reach agreement on a final set of procedures and criteria. If such an agreement cannot be reached, the parties shall submit the matter to the Court for resolution.

SECTION 5. *Home Ownership to be Fostered.*

The Court finds that it is desirable to foster home ownership among the occupants of assisted housing units. Accordingly, the City shall endeavor to establish such Mandated Incentives as will tend to foster the production of assisted housing for sale and shall establish a program to apply available local, state and federal subsidies to the write-down of purchase costs by eligible purchasers of assisted housing units. Notwithstanding the foregoing, no proposed housing development containing assisted units shall in any way be disfavored in negotiation with the City for a particular mix of Mandated Incentives, or be delayed or hampered in its applicable approval process solely because it proposes to offer assisted housing units for rental rather than for sale.

SECTION 6. *Architectural Integration.*

Developers shall make no locational distinctions between assisted and other units, provided that for any building eight or more stories in height, the top two floors may be reserved for market rate units. Assisted units, whether for sale or rental, shall meet HUD minimum property standards with respect to square footage. Assisted units need not be furnished with each and every amenity as a developer may choose to include in a market rate unit.[2] The City shall foster (to the extent feasible) the use of such architectural and design devices as will minimize the visual impact of such housing developments on the surrounding community and any distinction between assisted and market units.

SECTION 7. *Staging.* Assisted units in any housing development shall obtain certificates of occupancy no later than according to the following schedule:

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[2] Without limitation, the term "amenities" is intended to encompass items such as: custom-finished basements; fireplaces; customized kitchens; specialized finished, flooring, or fixtures, etc.

Percentage of Market Rate Units Receiving Certificates of Occupancy	Percentage of Assisted Units Receiving Certificates of Occupancy
Up to 25%	0% (none required)
25% + 1 unit	At least 10%
50%	At least 50%
75%	At least 75%
100%	100%

SECTION 8. *Mandated Incentives.* Consistent with Section 17 of the First Decree, the City shall provide appropriate Mandated Incentives to attract private development of assisted housing units. The type, extent and combination of necessary Mandated Incentives to be utilized with and given to a particular developer of multifamily housing may depend, among other things, on the allocation to specific income groups of assisted units which the developer (subject to the terms hereof) elects to make, the degree to which assisted financing may be available, prevailing economic and housing-market conditions, and the developer's business expectations. Accordingly, the City should be allowed discretion to establish with each developer of multifamily housing a mix of Mandated Incentives which would encourage construction, notwithstanding the financial burden associated with the inclusion of the required share of assisted units. However, the City shall exercise such discretion in good faith to encourage the timely attainment of the Goal. The examples set forth below illustrate the types of Mandatory Incentives which the City shall be prepared to implement:

Example 1. Increase the maximum permitted Height of a Building.

Example 2. Increase the maximum permitted Floor Area Ratio of a Building.

Example 3. Change the formulas set forth in Section 107-55 (B) of the Yonkers Code for the calcula-

tion of floor-area ratios for mixed-use buildings so as to lower the contribution of stories devoted exclusively to non-residential uses.

Example 4. Reduce the minimum permitted Lot Width or Lot Area for apartment houses.

Example 5. Reduce the minimum permitted Lot Area per family.

Example 6. Reduce the minimum permitted Rear Yard or minimum permitted Front Yard.

Example 7. Grant the owner of multifamily rental housing a full tax abatement on City real-estate taxes for the percent of units which are assisted but not to exceed 50 percent of the total number of units in the development including both assisted and non-assisted units. The benefits of the tax abatement to the non-assisted units are to be provided to the developer for use in further reducing the rental payments required of the assisted units so as to make them affordable within the defined rental limits.

Example 8. Vary the extent and/or duration of the incentive referred in Example 7 depending on the extent to which the owner elects to carry a larger than required share of assisted units allocated to households in an income group described in clauses (a) and/or (b) of Section 15 of the First Decree.

Example 9. Grant a tax abatement on City real-estate taxes to households buying assisted units. An additional tax abatement may be granted to up to 50 percent of the total number of units being constructed to be used to skew the monthly payments of the non-assisted units so as to further reduce the monthly payments required of the assisted units.

Example 10. Vary the extent and/or duration of the incentive referred to in Example 9 depending on the household's income level.

Example 11. Waive a portion of all application or processing fees which would otherwise be payable by developers seeking building-related approvals from the City.

Example 12. Grant a zoning overlay in (subject to the proviso in clause (d) of Section 17 in the First Decree) any district not zoned MG, M, A or BA.

Example 13. Cause funds in the AHTF to be applied (subject to applicable orders of this Court and HUD regulations) to site preparation or improvement at a site to be used for the construction of assisted units.

Example 14. Provide that, notwithstanding anything to the contrary contained in Chapter 107 of the Yonkers Code, a particular housing development may contain a certain number (or percentage) of units in excess of the number which would otherwise have been allowed by such Chapter.

Example 15. Cause the Industrial Development Authority (to the extent it is within the power of the City to cause such result) to provide assisted financing for the construction or permanent financing of the portion of a housing project represented by assisted units.

Example 16. Vary the extent of the assisted financing referred to in Example 15 depending on the extent to which the owner or developer elects to carry or sell a larger than required share of assisted units allocated to households in an income group described in clauses (a) and/or (b) of Section 15 of the First Decree.

The foregoing examples embody the types of steps which (consistent with Section 17 of the First Decree) the City shall be prepared to take, as warranted, to realize the objective of attaining the Goal, as set forth

herein and in the First Decree. The illustrations above do not require the City to offer a particular incentive (either as to type or extent) to any particular developer, housing development or owner. Nothing herein shall be interpreted to create in favor of a third party any right to obtain a particular incentive herein mentioned. However, in considering development proposals, the City shall act in a uniform, objective and non-arbitrary manner designed to afford all such proposals a fair opportunity to contribute appropriately to achievement of the Goal.

SECTION 9. *The Affordable Housing Trust Fund.*

The funds now and hereinafter placed in the AHTF as previously directed by this Court shall be expended (to the extent consistent with HUD statutes and regulations governing the application of CDBG funds) on (i) site-improvement projects (i.e. site preparation, sewage works, roads, etc.) for sites on which multifamily housing projects containing assisted units are to be constructed and (ii) to directly assist in the acquisition of property through a Local Development Corporation's activities. In no event shall such funds be made available to private developers to defray construction or carrying costs for assisted units. Affordable Housing Trust funds may also be expended in manners otherwise consistent with HUD statutes and regulations if, in response to specific developer proposals, such other incentives will sufficiently obtain the overall objectives of the Long Term Plan. The City, therefore, shall have the right, upon obtaining Court approval, to use Affordable Housing Trust funds in other permissible manners.

SECTION 10. *Credit Against Goal.* The City may provide (on a project-by-project basis, on an area-wide basis or otherwise) Mandated Incentives for the construction of assisted units in areas other than East and Northwest Yonkers. The City shall be given a credit of one unit of assisted housing towards the satisfaction of the

assisted housing goals set forth in either clause (b) or (c) of Section 15 of the First Decree for every two units of assisted housing (allocated to households in the income group for which credit is claimed) constructed in such areas, up to a maximum credit of 100 units against each such goal. Such assisted units shall be subjected to the same occupancy, resale, architectural and other restrictions and requirements as assisted units constructed in East and Northwest Yonkers.

SECTION 11. *Expedited Review: Organizational Structure.* (a) In addition to such other procedures as may be established to render the Mandated Incentives most effective, the City shall establish an expedited review process for housing projects containing assisted units to include priority scheduling and expedited review and negotiation of applicable Mandated Incentives.

(b) The City shall centralize in one administrative department, agency or office (the "Implementation Office") the administration of this long-term housing plan. The Implementation Office shall be a part of the Fair Housing Office created pursuant to this Court's May 26, 1986 Housing Remedy Order and shall be under the direction of the Executive Director of that Office. The responsibilities of such Office shall include acting as an ombudsman before all City agencies which may be involved in the process of approving multifamily housing developments and facilitating the expeditious completion (by such other agency, department or office as may be responsible therefor) of: all reviews and approvals, negotiations with specific developers and grants (if appropriate) of specific Mandated Incentives. Such Office shall also have the power to pre-approve or screen particular proposals, to assist developers in the application process, to implement a marketing program to make widely known the availability of Mandated Incentives and of assisted units among developers and potential purchasers and tenants of assisted units, and to imple-

ment such other administrative steps as may be required or convenient for the more effective realization of the objective of achieving the Goal (e.g. the creation of an advisory board of responsible citizens to assist in the foregoing task); provided that, the Implementation Office shall not exercise the power of other City agencies. Moreover, the administrative and coordinating functions described above shall not require that the City vest in the Implementation Office the final discretionary authority to approve specific projects or to grant specific Mandated Incentives.

(c) The Implementation Office shall remain in existence for the duration of this Decree. The Executive Director of the Fair Housing Office shall be responsible for formulating and presenting for approval and funding a budget for such Office, as well as for the hiring and firing of the employees of such office.

SECTION 12. *"Section 8" Certificates.* The City shall consider in good faith any plans for assisting eligible families in utilizing their "Section 8" certificates or vouchers which plaintiff or plaintiff-intervenors may at any time hereafter present to the City.

SECTION 13. As specific plans are formulated for the construction of affordable housing, projections for the additional number of school age children who would occupy Long Term Plan housing developments shall be furnished to the School Board. The School Board shall advise the Court and the parties as to the capacity of the existing school system to accommodate such additional children, whether expansion is required and the impact, if any, of such changes on the School Board's ability to comply with the Educational Improvement Plan.

SECTION 14. If at any time any party to this litigation believes that a proposal for the construction of housing is consistent with and furthers the objectives

of the Housing Remedy Order and the Long Term Plan, but requires an exemption from some of the specific provisions contained herein, application may be made to the Court for a waiver or modification of such provisions with respect to that specific proposal.

SO ORDERED:

/s/ LBS
LEONARD B. SAND, U.S.D.J.

DATE: 6/13/88

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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80 CIV 6761 (LBS)

UNITED STATES OF AMERICA,
Plaintiff,

and

YONKERS BRANCH—NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,
Plaintiff-Intervenors,

against

YONKERS BOARD OF EDUCATION; CITY OF YONKERS; and YONKERS COMMUNITY DEVELOPMENT AGENCY,
Defendants.

CITY OF YONKERS and YONKERS COMMUNITY DEVELOPMENT AGENCY,
Third-Party Plaintiffs,

against

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, and SECRETARY OF HOUSING AND URBAN DEVELOPMENT,
Third-Party Defendants.

ORDER

SAND, J.

WHEREAS, the City Council of Yonkers, on June 28, 1988, defeated a proposed resolution to declare its commitment to implementation of this Court's prior housing

remedy orders, including the Long Term Plan, it is hereby

ORDERED, that the Department of Justice and the NAACP submit by July 5th a proposed order requiring Yonkers to take specific implementing action pursuant to a prescribed time-table, on penalty of a finding of contempt and the imposition of bankrupting fines. Oral argument with respect to such proposed Order will be held on July 12, 1988, at 10:00 A.M.

SO ORDERED.

Dated:

New York, New York
June 29, 1988

/s/ Leonard B. Sand
LEONARD B. SAND
U.S.D.J.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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80 CIV 6761 (LBS)

UNITED STATES OF AMERICA,
Plaintiff,

and

YONKERS BRANCH—NAACP, *et al.*,
Plaintiffs-Intervenors,

v.

YONKERS BOARD OF EDUCATION, *et al.*,
Defendants.

ORDER

Part VI of this Court's May 26, 1986 Housing Remedy Order required the City of Yonkers to submit, by November 15, 1986, a Long Term Plan for affordable housing units. It is beyond dispute that the City has defaulted on this obligation. Specifically, the City of Yonkers refused to submit such a plan on November 15, 1986. Furthermore, despite its agreement in the January 28, 1988 First Remedial Consent Decree in Equity to adopt "no later than 90 days after entry of [the January 28, 1988 decree]" a legislative package of incentives for developers to encourage development of 800 units of affordable housing, and this Court's entry of the Long Term Plan Order on June 13, 1988, the City has failed and refused to enact such legislation. On June 28, 1988, the City Council defeated a Resolution stating that the City would enact such legislation. In its Memorandum filed on July 11, 1988, the City further stated that "the

City has indicated by the defeat of the Resolution . . . that it will not voluntarily adopt the legislation contemplated by [the Long Term Plan] Order." City of Yonkers Memorandum of Law in Opposition to Plaintiffs' Proposed Order, p. 4. This Court will tolerate no further violation of its lawful orders and accordingly enters this Order.

1. The City of Yonkers is hereby ORDERED to enact, on or before August 1, 1988, the legislative package relating to the long-term plan as described in Section 17 of the First Remedial Consent Decree in Equity dated January 28, 1988 and the Long-Term Plan Order dated June 13, 1988.

2. It is further ORDERED that, in the event the City of Yonkers fails to enact the legislative package on or before August 1, 1988, the City of Yonkers shall be required to show cause at a hearing before this Court at 10:00 a.m. on August 2, 1988, why it should not be held in contempt, and each individual City Council member shall be required to show cause at a hearing before this court at 10:00 a.m. on August 2, 1988, why he should not be held in contempt.

3. It is further ORDERED that, if the necessary legislation is not passed on or before August 1, 1988, and the City cannot demonstrate why it should not be held in contempt, beginning on August 2, 1988, the City shall be subject to daily fines until such time as the City has purged itself from contempt by enacting the legislation. The City's fine shall be $100 for the first day and the daily rate shall be doubled for each consecutive day of non-compliance. Said fine shall be payable by a check drawn to the "Clerk, Southern District of New York" and the City Manager shall cause said check to be delivered to the Clerk of the Court no later than 4:30 p.m. on each day that the Clerk's Office is open and shall be

drawn for the amount of the fine incurred for the previous day. The check to be delivered on a Monday or day after a holiday shall include all fines incurred with respect to the days on which the Clerk's Office was not open. The proceeds of said checks shall be paid into the Treasury of the United States for general purposes and shall not be ear-marked, escrowed, or otherwise allowed for any special purpose or fund. Fines paid pursuant to this Order shall not be refunded even in the event that the City eventually ceases its contumacious conduct.

4. It is further ORDERED that, if the necessary legislation is not passed on or before August 1, each of the Council members who fails to vote in favor of enactment of such legislation, and has not demonstrated why he should not be held in contempt, shall be personally fined $500 per day every day (but not doubling) until such time as such individual has purged himself from contempt as described below or the City has enacted the legislation. Said fine shall be payable by a check drawn to the "Clerk, Southern District of New York" and shall be delivered to the Clerk of the Court no later than 4:30 p.m. on each day that the Clerk's Office is open and shall be drawn for the amount of the fine incurred for the previous day. The check to be delivered on a Monday or day after a holiday shall include all fines incurred with respect to the days on which the Clerk's Office was not open. The proceeds of said checks shall be paid into the Treasury of the United States for general purposes and shall not be ear-marked, escrowed, or otherwise allowed for any special purpose or fund. Fines paid pursuant to this Order shall not be refunded even in the event that an individual ceases its contumacious conduct. Fines imposed by this paragraph shall be paid personally by each individual Council member and under no circumstances shall any City funds be used or appropriated for such purpose. An individual may purge himself by

voting to enact the necessary legislation. However, if the legislation is not passed and on any subsequent vote such individual again fails to vote in favor of the legislation, he or she shall once again be personally fined $500 per day until such time as such individual has once again voted in favor of the legislation or the City has enacted the legislation.

5. It is further ORDERED that, if the necessary legislation is not enacted by on or before August 10, 1988, any Council member who then remains in contempt shall be committed on August 11, 1988 to the custody of the United States Marshall for imprisonment until such time as the City has enacted the legislation or such member has purged himself from contempt as provided in paragraph 4. The fines described in paragraph 4 shall continue during any time of imprisonment.

6. It is further ORDERED that the Mayor of Yonkers shall convene a special session of the City Council for the purpose of voting on the legislative package at least once a week beginning on August 1, 1988, or more frequently if so requested by any Council member. Any Council member who is imprisoned pursuant to paragraph 5 above shall be released for the purpose of attending such meetings and for no other purpose.

7. It is further ORDERED that the City shall forthwith deliver a copy of this Order to the New York State Emergency Financial Control Board for the City of Yonkers.

8. It is further ORDERED that the Mayor of the City of Yonkers shall by August 1, 1988 post in a conspicuous place in all public buildings a copy of this Order together with the following notice:

> All employees of the City of Yonkers are hereby put on notice that failure to comply with, or interference with implementation of, the court order

attached herewith may subject any employee of the City of Yonkers to personal contempt sanctions imposed by the court.

It is so ORDERED, this 26 day of July, 1988.

/s/ Leonard B. Sand
LEONARD B. SAND
United States District Judge

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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80 CIV 6761 (LBS)

UNITED STATES OF AMERICA,
Plaintiff,

and

YONKERS BRANCH—NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,
Plaintiff-Intervenors.

v.

YONKERS BOARD OF EDUCATION; CITY OF YONKERS; and YONKERS COMMUNITY DEVELOPMENT AGENCY,
Defendants.

ORDER ADJUDICATING CITY OF YONKERS IN THE CIVIL CONTEMPT

SAND, J.

On July 26, 1988, this Court entered an Order requiring the City of Yonkers to pass on or before August 1, 1988, the legislative package relating to the long-term plan as described in Section 17 of the First Remedial Consent Decree in Equity dated January 28, 1988, and the Long-Term Plan dated June 13, 1988 ("Affordable Housing Ordinance"). Following entry of that Order, counsel for the City raised a number of questions as to the applicability of state law requirements relating to amendments to the City's zoning ordinance. Rather than deal with any question of federal preemption, this Court notified counsel for the City and the Plaintiffs by letter dated July 28, 1988, that compliance with its July 26th

Order could be met by adoption by the City Council of a resolution committing the City to enact the Affordable Housing Ordinance within the minimum time prescribed for notice pursuant to state law.

The July 26th Order further provided that upon the City's failure to enact the legislative package as required, the City and its individual city council members would be required to show cause at a hearing on August 2nd as to why they should not be held in civil contempt of the July 26th Order.

At the hearing held on August 2, 1988, counsel for the City advised that on August 1st, the City Council, by a vote of 4-3, refused to adopt the required resolution. Members of the city council voting against the resolution were identified as Vice-Mayor Henry Spallone, Majority Leader Nicholas Longo, Edward Fagan, and Peter Chema.

At the hearing, the City was given ample opportunity to show cause why it should not be held in civil contempt of this Court's July 2, 1988 Order. Having considered the arguments of all parties, this Court finds as follows as to the City of Yonkers

1. The City received adequate notice as to its duty under the July 26th order;

2. At the hearing on August 2, 1988, the City had adequate opportunity to be heard; and

3. The City had the ability to comply and a full understanding of the consequences of non-compliance.

Accordingly, the City of Yonkers is adjudged in civil contempt of this Court's July 26, 1988 Order. The Court notes that this action is but the latest in a series of contempts of this Court's prior orders. However, this contempt is the most immediate and clearly drawn.

In so finding, this Court rejected the City's contention that a dichotomy can be drawn between the City and its council members through which it acts.

Therefore, it is hereby ORDERED that:

1. Until such time that the City has purged itself of contempt by enacting the Affordable Housing Ordinance or a resolution of intent to adopt the same, the City shall be subject to daily fines as set forth in Paragraph 3 of the July 26, 1988 Order. The first check is due and payable by 4:30 p.m. on August 3, 1988.

2. If at some later point, the City purges itself of contempt and then resumes its contumacious conduct, the level of fines to be imposed for such renewed contumacy shall begin at the level at which the fines had previously ceased; and

3. The City may apply in this Court at any time for relief from this Order based upon a showing of changed circumstances warranting such relief.

It is further ORDERED that the City's application for a stay of this Order is DENIED.

SO ORDERED

DATED: August 2, 1988
New York, New York

/s/ Leonard B. Sand
LEONARD B. SAND
United States District Judge

No. 88-855

Supreme Court, U.S.
FILED
JAN 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1988

YONKERS RACING CORPORATION,

Petitioner,

v.

THE CITY OF YONKERS,

Respondent,

and

UNITED STATES OF AMERICA and YONKERS BRANCH, NAACP, ET AL.,

Intervenor-Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ON BEHALF OF YONKERS BRANCH, NAACP, et al.

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In The
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Intervenor-Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ON BEHALF OF YONKERS BRANCH, NAACP, et al.

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1. STATEMENT OF THE CASE

This is a matter related to United States and Yonkers Branch, NAACP, et al., vs. Yonkers Board of Education, et al., 80 CIV 6761 (S.D.N.Y.) currently before this Court on the petitions for writs of certiorari by four members of the Yonkers City Council and the City of Yonkers. This Court previously rejected the City of Yonkers' petition for a writ of certiorari to review underlying liability and remedy issues. 108 S.Ct. 198 (June 13, 1988).

In November 1985, after a ninety two day bench trial, the district court, Sand, J., ruled that the City of Yonkers had engaged in generations of racial segregation, excluding minorities persons from East Yonkers

neighborhoods. 624 F.Supp. 1275 (S.D.N.Y. 1985). After a remedy hearing, the district court ordered, *inter alia,* Yonkers to submit sites for the construction (with federal funds) of 200 units of public housing. 535 F.Supp. 1588 (S.D.N.Y. 1986) [In 1980 and again in 1982 Yonkers had promised HUD, as a condition of receiving federal Community Development Block Grant assistance, that it would construct 200 assisted housing units when federal funds for that purpose became available.]

Yonkers failed to submit appropriate sites to HUD or to the district court and the housing remedy process stalled. Finally, with the strong affirmance of the district court's liability decision by the United States Court of Appeals for the Second Circuit, 837 F.2d 1181 (1987) on January 27, 1988, the City Council agreed to enter into a Consent Decree with the plaintiff, United States, and the plaintiffs-intervenor, Yonkers Branch, NAACP, et al. The Decree located 200 units of public housing on seven sites in East Yonkers, including a parcel on Clark and Loring Streets owned by petitioner.

All the parcels listed in the Consent Decree had, prior to their inclusion, been the subject of considerable inquiry and study. Each had been identified as appropriate for public housing by the Outside Housing Advisor, a court-appointed advisor expert in urban planning and the location of assisted housing. After the selection of these sites, the federal funding agency, HUD, conducted a review to insure that each met federal standards governing the placement of public housing. Such a review evaluates (a) the probability that any such new housing will exacerbate current conditions of racial segregation [clearly not an issue in the overwhelmingly white neighborhood involved here]; (b) the proximity of the site to standard amenities, i.e., transportation; shopping, etc. and (c) the environmental

suitability of the site for residents of public housing, i.e., noise studies; review of any possible toxic waste conditions on site; contiguity to hazardous conditions, etc.

In addition, by late January 1988, the parties in *United States v. Yonkers,* had all been provided opportunity to comment on the attributes of petitioner's parcel. Each concluded that it was an appropriate site. HUD also had given preliminary approval and the Consent Decree conditioned ultimate acceptance of this site on its passing more rigorous HUD review. After entry of the Decree, HUD reaffirmed its conclusion that the site met all relevant federal standards and authorized its inclusion in a Request for Proposals (issued in early December 1988) from developers. *See generally,* 24 C.F.R. sec. 941.202 (1988).

The Decree required Yonkers to first seek to negotiate a purchase price with each respective property owner.[1] Failing agreement with the titleholder on price within forty-five days, the City was to initiate eminent domain proceedings in State Supreme Court to acquire title to the subject properties at an established price. Under state law, title to the disputed property would pass to the City upon the acceptance by the State Supreme court of the petition initiating eminent domain, and would not be delayed until the determination of just compensation. Acceptance of the petition would occur after the State Supreme Court determined that the condemnor had complied with the requisites of state law or been excused from such compliance.

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1. Of the seven sites included in the Consent Decree, four were privately-held and three were City-owned parcels.

Failing to reach agreement with petitioner on a purchase price, the City failed to timely initiate eminent domain proceedings. Under further threat of contempt of court, Yonkers reluctantly initiated the required proceedings and petitioner then raised two affirmative defenses: that the City had failed to (a) follow the explicit notice and hearing provisions of the State's Eminent Domain statute and (b) comply with the terms of the State Environmental Review Act (SEQRA).[2]

On May 27, 1988, the NAACP orally moved the district for an order compelling the respondent in the Article 78 proceeding, the City of Yonkers, to remove that action to federal court.[3] The NAACP so moved because the City of Yonkers was then opposing, in every way possible, implementation of the January 28, 1988 Consent Decree and it did not believe that the City could be trusted to pro-

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2. In its petition filed on April 25, 1988, the City claimed exemption from the notice and review requirements of the EDPL on the basis of the "emergency" provisions of that statute. EDPL sec. 206(d). Petitioner has not included this petition in the appendix.

3. Petitioner erroneously states that the United States initiated this action. The United States sought removal of the similar Article 78 proceeding initiated by the Archdiocese of New York and objecting to the taking of the so-called Seminary site on Valentine Avenue. At the end of the May 27, 1988 hearing on that motion, counsel for the City of Yonkers informed the court of the pendency of the Raceway's similar Article 78 proceeding. Thereafter, counsel for the NAACP, previously unaware of that action's existence, moved for an order compelling Yonkers to remove that action. The district court granted that motion.

perly defend that Decree in state court. 18a.[4]

Contrary to the Raceway's statement of the case, the motion to remove was not predicated either upon a concern with petitioner's desire to exercise its due process rights or any intent to impede its challenges to the eminent domain petition.[5] Rather, the movant's central concern

4. By that date, the City had filed two motions, the first to modify the Consent Decree by striking Section 10 which prohibited it from seeking further review of its underlying obligation to provide sites for and permit the erection of the 200 units of public housing and the second to vacate the entire decree on the ground of change in circumstance—the support of John Cardinal O'Connor was allegedly integral to the City Council's willingness to enter into the Decree in the first place and His Eminency was now attacking the Decree as "fatally flawed." While the district court denied both motions, both the United States and the NAACP believed the City would take any actions possible to defeat implementation of the court orders, a view confirmed by the lengthy contempt of court struggle which gained national attention a few short months later. As the Court of Appeals noted, "Despite the City's assurance through its counsel that it would vigorously defend against the Article 78 petitioners, we have serious doubts that a reluctant condemnor, which at every opportunity has resisted implementation of the Housing Remedy Order could be counted on in state court to adequately protect the integrity of the Consent Decree. To believe otherwise would be to ignore the fact that Yonkers entered into the Consent Decree and instituted the condemnation proceedings only after being threatened by the district court with sanctions for contempt. "One must realistically deal with the fact," Judge Sand explained, "the positions which the City would be compelled to take in [state court] would be significantly contrary to the positions taken by [it] in [the district] court." The inconsistency of these positions convinces us, therefore, of the necessity to exercise removal jurisdiction to prevent frustration of the Housing Remedy Order." 18A

5. Petitioner speculates that "the order under the All Writs Act was issued to the *City, not the Raceway*" because "the United States wanted to find some way around the fact that the City could not remove the proceedings, not that the Raceway was in any way acting inconsistently with the Consent Decree." (Brief at 15). In fact, the order was issued against Yonkers because as a respondent in the state court proceeding, it had the right to initiate removal and, due to the city's opposition to implementation of the Consent Decree, the NAACP believed it had to be required to remove to protect the integrity of that agreement. The district court and the Court of Appeals both agreed with that reasoning.

was that these issues be litigated in the same forum which had approved a Consent Decree entered to remedy adjudicated constitutional violations. Indeed, the Raceway's due process right to a day in court were entirely preserved, though, concededly its choice of forum was altered by the district court's grant of the NAACP's motion to order the City of Yonkers to remove the Article 78 petition from state to federal court.

The district court rejected the Raceway's suggestion that its Article 78 petition concerned no matter of federal law. Instead, it held that the outcome of that proceeding, and even the time taken to resolve it, clearly jeopradized the implementation of the housing remedy order, entered to vindicate the rights of members of plaintiff-intervenor' class.[6] Moreover, the district court believed that its interpretation of the Consent Decree, including the provision requiring the City to initiate eminent domain proceedings, should supersede that given by a state court.

The district court ordered Yonkers to remove the Article 78 proceeding (in which it was respondent) and proceeded to decide the issues raised therein on the merits. The court found that the requirements of the Eminent Domain Procedure Law were inapplicable where a federal

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6. Permitting the matter to remain in state court would cede control over the pace of implementation of the housing remedy to that forum, clearly inconsistent with the obligation of a federal court to insure the expeditious vindication of constitutional rights. In fact, to date, the State Supreme Court has not approved any of the condemnation petitions filed by Yonkers in April 1988, causing the district court to deem title to be transferred so as to allow the Request for Proposals to issue. This became necessary when HUD advised that it could not approve the issuance and publication of an RFP until the municipality had title to the property upon which construction of public housing was contemplated.

court had already determined that the taking in question served a critical public purpose and that the subject property was suitable for the end. Alternatively, the district court found that the imperative of relieving the unconstitutional condition constituted an emergency which more than justified Yonkers' failure to go through a notice and review process, the results of which had already been pre-determined by the entry of the Consent Decree in federal court. Indeed, Yonkers' obligation to take this property arose by dint of federal court order; local procedures could not affect that requirement and following them would simply waste time and energy, not advance justice. Moreover, the district court found that SEQRA specifically exempted from its coverage municipal actions taken pursuant to litigation, as was clearly the case here.

By decision of September 22, 1988, the United States Court of Appeals for the Second Circuit affirmed the district court's denial of petitioner's Motion to Remand and its ruling on the merits of the Article 78 proceeding.

In November 1988, this Court denied the petitioner's application for a stay. Thereafter, to allow for the issuance of a Request for Proposals to build low income housing on this site, among others, the district court found it necessary to deem its title to have passed to the City of Yonkers due to the continued pendency in the state court of the City's eminent domain proceeding.

II. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

a. THE DISTRICT COURT PROPERLY REMOVED THIS MATTER

The Raceway submits that the district court lacked subject matter jurisdiction.[7] This argument depends on the artificial separation which petitioner draws between the subject matter of this suit and the vindication of federal constitutional rights stemming from the underlying civil rights lawsuit. This suggestion is illogical in the extreme.

Assuming that the district court could have required that the City initiate all eminent domain procedings in its court to insure both the expeditious determination of any such action and its efficacy, the Raceway offers no explanation of why, in light of the clear prospect of delay in resolving its Article 78 action in another forum, the district court was without the authority to require removal of that action under the authority granted by the All Writs Act.

The Raceway provides no citation to any like situation where a federal court with a need to remove a state action so as to properly exercise and discharge its jurisdiction over an underlying federal case has been prevented from so proceeding. Instead, where state proceedings

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7. Contrary to petitioner's suggestion, the Court of Appeals did not decide the question of whether the removal statute on its own terms would have justified removal here. Instead, finding an alternative ground for removal in the All Writs Act, the Second Circuit did not resolve "this difficult question." 14a.

stand as an impediment to the fulfillment of civil rights, federal constitutional interests prevail. *Swann v. Charlotte-Mecklenburg Board of Educ.*, 501 F.2d 383, 384 (4th Cir. 1974); *North Carolina State Board of Educ. v. Swann*, 402 U.S. 43, 45 (1971).

No party here argues that the Raceway's claim that the instant taking violates certain state statutory rights independently raises a federal claim. Nor has any party asserted that because of the existence of the Consent Decree the Raceway should be disabled from "asserting its rights under state law." *Cf.*, Brief at 14. What is contended, however, is that resolution of its state law claims, integrally related to the federal action, is properly achieved in the federal court which entered the underlying order -that requiring the taking of the property to vindicate federal constitutional rights.

Moreover, this case provides no occasion for petitioner's complaint as to the "radical expansion" of the federal court's jurisdiction. The very state court action it initiated only arose because the federal court did not insist on the initiation of the eminent domain proceedings in its court in the first instance. And, such situations are not likely of repetition and then only in instances where there is a clear connection between the after-initiated state court action and the need to vindicate the federal constitutional right. As the district court properly determined, "It would be difficult, even hypotethically, to construct a situation in which there is a closer relationship between the Article 78 proceedings and the implementation of federal civil rights remedial order than is present here." 43a.

Petitioner asserts that the All Writs Act cannot be the basis for removal. In *Pennsylvania Bureau of Corrections*

v. United States Marshals Service., 474 U.S. 34, 43 (1985), this Court held that the All Writs Act may be invoked "to fashion extraordinary remedies when the need arises." The All Writs Act may inform the exercise of federal authority even where another federal statute ordinarily would govern the issue. *United States Alkali Export Ass'n. v. United States,* 325 U.S. 196, 201-204 (1945). Such an exercise is particularly necessary and appropriate to avoid the frustration of previously entered federal court orders. *United States v. New York Telephone Co.,* 434 U.S. 159, 172 (1977).

The Raceway never confronts, either directly or indirectly, the reality that failure to remove would clearly have held out the real prospect for frustration of and delay in implementation of critical district court orders. This central fact distinguishes this situation from those in which federal courts have sought to exercise jurisdiction over matters neither within their jurisdiction nor so intimately related to a matter so characterized. Indeed, contrary to petitioner's suggestion (Brief at 13), there is simply no conflict between the decision of the Second Circuit and that of any other Court of Appeals. Not, more critically, does the Court of Appeals' dicision conflict with any precedent of this Court.

b. THE DECISION BELOW IS NOT CONTRARY TO STATE LAW

As explained above, the district court entered the Consent Decree after considerable scrutiny and study of all affected sites, including petitioner's. The Raceway suggests that after the entry of the Consent Decree, which obligated it to acquire the property in question, the City should have scheduled a hearing to determine, among

other things, "the general effect of the proposed project on the environment and residents of the locality" and "such other factors as it considers relevant."

This is simply a frivolous proposition which is unworthy of review. Accepting the Consent Decree, the district court determined that the sites included therein were appropriate locations for the 200 units of public housing.[8] It was not then for Yonkers to initiate a series of public hearings under the Eminent Domain Procedures Law to revisit that issue for each site in question, in whatever semantic guise. Such a process would have implied that, on the basis of any such hearings, the City could have disobeyed the requirements of the Consent Decree. But, this is absurd and only points out that by definition, the federal adjudicatory process settled the propriety of the sites in question for purposes of EDPL sec. 204. As the district court held, the review process described above served as "substantial compliance" with the purposes of the State notice and review provisions" (53a) and further local proceedings would prevent the expeditions vindication of federal rights. *Id.*

The Court of Appeals agreed, holding that "given the undisputed public purpose inherent in the implementation of the Housing Remedy Order and the nature and extent of the review process, we are convinced that there was a

8. Petitioner claims that "there was no proof in the record" that preliminary federal environmental studies had been performed sufficient to satisfy the requirements of New York law." While this statement may be true of the record it placed before the district court, the record in *United States v. City of Yonkers* contains, as petitioners know, HUD analysis showing the suitability of this and the other sites in question.

valid determination that the proposed condemnations would be in the public interest as required under Article 2 of the EDPL." 23a.[9]

Alternatively, the Court of Appeals properly affirmed the district court's rejection of petitioner's suggestions (a) that the emergency exception clause to the EDPL applies only to physical emergencies, 21a, and (b) that Yonkers' responsibility for prior delays was relevant to the existence in 1988 of an emergency requiring expeditious action to further implementation of the Consent Decree, 21a-22a, citing *Gerges v. Koch,* 62 N.Y. 2d 84 (1984).

Finally, the courts below properly ruled that the State Environmental Quality Review Act, Environmental Conservation Law (ECL), sec. 8-0101 *et seq.* was satisfied by HUD's review process under the National Environmental Policy Act (NEPA), 42 U.S.C. sec. 432 et seq. In addition, the proposed condemnations are exempt from SEQRA since they are being undertaken "pursuant to a judgment or order" entered by "any court". 6 NYCRR sec. 617.2(q) (1), (5). Petitioner's suggestion that this exception applies only to situations initiated to force a party to comply with the environmental review statute finds no support in either the wording of the regulation or in common sense.

Finally, with regard to the alleged inappropriateness of the Raceway site or petitioner's alleged need for that parking lot, the district court determined "that there has

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9. Petitioner focuses on the reviews done or not done by Yonkers. Both courts below more properly focused on whether the process of selecting the sites in the January 1988 Consent Decree included substantial consideration of the matters deemed relevant by state law. On this issue, the record is clear and the petitioner is silent.

been no documentation of [the] claim made in oral argument that the parking lot site is essential to the operation of the Raceway. This court rejects such claim." 56a.

III. CONCLUSION

Because the petition raises no issues worthy of review and no compelling reason for review has ben supplied, we pray that this court deny the petition for a writ of certiorari.

Respectfully submitted,

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Nos. 88-854, 88-855, 88-856, and 88-870

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

HENRY G. SPALLONE, PETITIONER

v.

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v.

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the doctrine of legislative immunity barred the imposition of civil contempt sanctions against members of the Yonkers City Council for refusing to enact legislation to remedy the City of Yonkers' practice of racial discrimination in public and subsidized housing, where the specific obligation to enact such legislation arose from the consent decree earlier approved by the Yonkers City Council and entered by the district court at the remedial stage of litigation against the City of Yonkers.

2. Whether the district court abused its discretion in imposing civil contempt sanctions against members of the Yonkers City Council as a proper remedy for the refusal of the City of Yonkers, acting through the Yonkers City Council, to comply with the consent decree.

3. Whether the First Amendment prohibited the district court from imposing civil contempt sanctions against members of the Yonkers City Council for refusing to enact legislation to remedy the City of Yonkers' practice of racial discrimination in public and subsidized housing, where the specific obligation to enact such legislation arose from the consent decree earlier approved by the Yonkers City Council and entered by the district court at the remedial stage of litigation against the City of Yonkers.

4. Whether the district court violated the Due Process Clause in holding petitioner Peter Chema in contempt.

5. Whether the City of Yonkers may be held in civil contempt when, acting through the Yonkers City Council, the City refuses to comply with the consent decree.

6. Whether the district court's imposition of escalating fines for the City of Yonkers' civil contempt violates the Excessive Fines Clause.

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 856 F.2d 445.[1] The pertinent orders and opinions of the district court contained in petitioners' appendices are unreported: order requiring compliance with consent decree, July 26, 1988 (Pet. App. 160j-163j); modification letter, July 28, 1988 (Pet. App. 159i); oral opinions finding petitioners City of Yonkers and members of the Yonkers City Council in civil contempt, August 2 and 4, 1988 (Pet. App. 98g-99g, 129h-132h, 143h-144h, 157h); orders adjudicating petitioners City of Yonkers and members of the Yonkers City Council in civil contempt, August 2 and 5, 1988 (Pet. App. 72f-74f; 88-855 Pet. App. 65a-67a; 88-870 Pet. App. 15a-18a).

JURISDICTION

The judgment of the court of appeals was entered on August 26, 1988. The petitions for a writ of certiorari were each filed on November 23, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. After more than 90 days of trial in 1983 and 1984, the district court issued an opinion on November 20, 1985, holding petitioner City of Yonkers liable for a pattern and practice of intentional racial discrimination in the selection of sites for public and subsidized housing, in violation of the Equal Protection Clause of the Fourteenth Amendment and Title VIII of the Civil Rights Act of 1968 (Fair Housing Act), 42 U.S.C. 3601 *et seq.* *United States* v. *Yonkers Bd. of Educ.*, 624 F. Supp. 1276, 1289-1376 (S.D.N.Y. 1985). The court found that the City of Yonkers had deliberately concentrated virtually all of its

[1] "Pet. App." refers to the appendix to the petition in No. 88-854, unless otherwise indicated.

public and subsidized housing in the southwest quadrant of Yonkers in order to maintain racial segregation. The court based its holding in large part upon the actions and inactions of the Yonkers City Council and individual Council members. See 624 F. Supp. at 1295-1328, 1342-1363, 1369-1372.[2]

Following remedial proceedings, on May 28, 1986, the district court entered its "Housing Remedy Order" that required the City of Yonkers and the Yonkers City Council to take a number of actions designed to facilitate the development of public and subsidized housing outside of Southwest Yonkers. *United States* v. *Yonkers Bd. of Educ.*, 635 F. Supp. 1577 (S.D.N.Y. 1986).[3] Part VI of the Order required the City, by November 1986, to develop and implement a plan, known as the Long Term Plan, for the creation of assisted housing, other than public housing, outside Southwest Yonkers. See *id.* at 1582.[4] The district court declined to set a goal for the number of housing units to be developed under the Long Term Plan, to establish a timetable for the development of such housing, or to prescribe how such housing should be provided. In-

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[2] Evidence of segregative intent included City Council members' acquiescence in the community's racially influenced opposition to public and subsidized housing outside areas of minority concentration (624 F. Supp. at 1369-1372), the City Council's reluctance to seek federal Section 8 housing certificates and, when the certificates were obtained, the confining of their use to minority families only in Southwest Yonkers (*id.* at 1342-1363).

[3] As petitioner City of Yonkers acknowledges, the Yonkers City Council is the City's governing authority (88-855 Pet. 5 n.3). Unless the context otherwise requires, we will therefore refer collectively to the City of Yonkers and the Yonkers City Council as the City.

[4] Part IV of the Housing Remedy Order required the City to designate sites for 200 units of public housing in East Yonkers. 635 F. Supp. at 1580-1581.

stead, the court left to the City both the opportunity and the responsibility for proposing the substantive aspects of the Plan. *Ibid.* The City, however, refused to submit any proposal for the Long Term Plan (Pet. App. 6a-7a). Indeed, the City took "no significant action to comply with the 1986 Housing Remedy Order" for the first year and a half after its entry (*id.* at 7a).[5]

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[5] The City's recalcitrance was not limited to the Long Term Plan. The City also refused to designate public housing sites, as required by Part IV of the Housing Remedy Order (Pet. App. 5a-6a). In December 1986, after the City had refused to submit a Long Term Plan proposal, the United States moved to have the City held in contempt. The Yonkers Branch of the National Association for the Advancement of Colored People, representing the class plaintiffs, meanwhile moved for the appointment of a special master to carry out the City's responsibilities under the Housing Remedy Order. The district court permitted the City to avoid contempt sanctions only after the City agreed to hire an Outside Housing Advisor to assist it in carrying out the Housing Remedy Order. Nonetheless, throughout 1987, the City continued to frustrate the court's and the plaintiffs' efforts to implement that Order. *Id.* at 7a. In fact, as the history of this litigation shows, the City acted constructively only when threatened with contempt. See, *e.g.*, *United States* v. *Yonkers Bd. of Educ.*, 662 F. Supp. 1575 (S.D.N.Y. 1987) (88-856 Pet. App. 1j-23j) (City Council took steps to advance its own remedy plan only after court threatened contempt and fines); *United States* v. *Yonkers Bd. of Educ.*, 675 F. Supp. 1407, 1410 (S.D.N.Y. 1987) ("It will come as no surprise to anyone familiar with the history of this litigation that the City has acted in a negative or at best neutral fashion with respect to all efforts to implement the Court's Housing Remedy Order, and that any initiatives to further such implementation have come from the Plaintiffs, Plaintiff-Intervenors, or the Court itself."); *United States* v. *Yonkers Bd. of Educ.*, 675 F. Supp. 1413, 1414 (S.D.N.Y. 1987) ("[T]he attitude of the representatives of Yonkers has been to do nothing affirmative, to place the entire onus of implementation on the Court, and to engage in obstructive and dilatory tactics. To date, there have been untoward delays in implementing the Housing Remedy Order some 18 months after its promulgation. Only the threat of bankrupting fines has produced any action by the City.").

The City appealed the district court's orders, although implementation of the Housing Remedy Order was not stayed (Pet. App. 6a). In a lengthy opinion, the court of appeals affirmed the district court's orders "in all respects," concluding that the district court "properly applied the appropriate legal principles, that its findings of fact [were] not clearly erroneous, and that its remedial orders [were] within the proper bounds of discretion." *United States* v. *Yonkers Bd. of Educ.*, 837 F.2d 1181, 1184 (2d Cir. 1987), certs. denied, Nos. 87-1632 and 87-1686 (June 13, 1988).

2. In January 1988, following the court of appeals' affirmance of the district court's orders, the parties negotiated the "First Remedial Consent Decree In Equity" (Consent Decree), which set forth the actions the City would take in order to comply with Part IV (public housing) and Part VI (Long Term Plan) of the Housing Remedy Order (Pet. App. 178*l*-185*l*). The Yonkers City Council approved the Consent Decree on January 27, 1988. The district court entered the decree as a consent judgment on January 28, 1988. *Id.* at 8a.

Sections 12 through 18 of the Consent Decree established the framework for the Long Term Plan that had been left unresolved in the original Housing Remedy Order (Pet. App. 182*l*-185*l*). The Decree set a goal of 800 units of assisted housing to be developed over four years in conjunction with market rate housing developments (*id.* at 182*l*-183*l*), and committed the City to specific actions needed to encourage private developers to build such housing (*id.* at 182*l*-184*l*). In Section 17, the City expressly agreed to adopt legislation providing for development incentives such as zoning changes, tax abatements, and density bonuses, within 90 days after entry of the Decree (*id.*

at 184*l*).[6] In Section 18, the parties acknowledged that certain "subsidiary issues" relating to the Long Term Plan remained unresolved and agreed to work toward their resolution in a second consent decree by February 15, 1988 (*id.* at 184*l*-185*l*).

Faced with intense public opposition to the Consent Decree, the City sought to avoid compliance with it. On March 21, 1988, the City moved to modify the Decree. The City even promised to return nearly $30 million in federal funds if it were relieved of its duty to allow the development of public housing in white neighborhoods, a request that ignored the fact that the City had been found liable for intentionally segregating public and subsidized housing (Pet. App. 9a). The district court denied the City's motion on March 31, 1988. As a result, the City refused either to continue the Long Term Plan negotiations required by Section 18 of the Consent Decree, or to enact the legislation required by Section 17. *Id.* at 9a-10a.[7]

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[6] The Consent Decree specifically provided (Pet. App. 182*l*) that

> [t]here shall be a presumption in favor of allowing two years for the Mandated Incentives to demonstrate their effectiveness in fostering the development of a sufficient number of Units timely to achieve the Goal without the adoption of additional remedial measures.

Additional measures that the parties agreed to forgo for a time included the use of City-owned land (*id.* at 183*l*).

[7] Undaunted by the district court's order, the City, on May 2, 1988, moved to vacate the Consent Decree in its entirety on the ground that the Archdiocese of New York (owner of St. Joseph's Seminary, a small part of which had been designated as a public housing site) had withdrawn its initial consent to the use of its property and no longer supported the Consent Decree. The district court denied the motion. The City sought no further review of that ruling. See *Yonkers Racing Corp.* v. *City of Yonkers*, 858 F.2d 855, 859-861 (2d Cir. 1988) (88-856 Pet. App. 7k-9k, 12k n. 1), petition for cert. pending, No. 88-1029.

On June 13, 1988, the district court entered its Long Term Plan Order that resolved the issues left open by the Consent Decree and provided the detail for the legislation that Section 17 required. That Order was based upon a draft prepared by the City's attorneys before the City withdrew from negotiations. The court entered the order after the plaintiffs had submitted a joint motion and proposed order, the City had submitted comments, and the court had held a hearing. The Order accommodated most of the City's objections to the proposal (Pet. App. 9a-10a, 164k-177k).[8]

Yet the City continued its program of resistance. On June 21, nearly two months after the deadline set in the Consent Decree for the City's enactment of legislation necessary to implement the Long Term Plan (and more than two years after entry of the original Housing Remedy Order), the district court asked the Yonkers City Council to pass a resolution adopting the provisions of the Long Term Plan Order (Pet. App. 10a).[9] The Council refused and on June 28 actually defeated a resolution that would have required the City to honor its previous commitments

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[8] The City challenged in the court of appeals only one substantive aspect of the Long Term Plan Order that concerned its state law authority to grant tax abatements (Pet. App. 31a). The court of appeals affirmed the entry of the Order (*id.* at 31a-32a). None of the petitioners challenges that aspect of the court of appeals' decision here.

[9] The court's request was not merely the result of the City's default in its Long Term Plan obligations under the Consent Decree. On June 14, the day after this Court denied the City's petition for a writ of certiorari to review the court of appeals' affirmance of the district court's liability and remedy orders (No. 87-1686 (June 13, 1988)), the City Council passed a resolution declaring a moratorium on all public housing construction in Yonkers—an unabashed defiance of the district court's Housing Remedy Order and the Consent Decree. Pet. App. 10a.

to implement the Housing Remedy Order, the Consent Decree, and the Long Term Plan Order. On July 11, the City told the district court that it would not voluntarily comply with the Consent Decree (although it had earlier approved that Decree) and, in trying to shirk all of its responsibilities, suggested that the court simply enact the Long Term Plan legislation itself (*ibid.*).

3. On July 26, 1988, the district court entered an order, proposed by the United States, that required the City, no later than August 1, 1988, to enact the legislation (known as the Affordable Housing Ordinance) required by Section 17 of the Consent Decree, and as set forth in the Long Term Plan Order (Pet. App. 160j-163j).[10] The July 26 Order also scheduled a hearing for August 2, at which time the City and individual members of the City Council who had voted against the Ordinance would be required to show cause why each should not be held in civil contempt if the Affordable Housing Ordinance were not enacted. The Order established the sanctions for such contempt: the City would be fined at a base rate of $100 for the first day and the fine would double for each day of noncompliance thereafter; the Council members would be fined $500 per day and imprisoned after 10 days of continued defiance. All contempt sanctions would end if and when the City enacted the legislation. *Id.* at 161j-162j.[11] By letter dated July 28, in response to the City's concerns that state law required notice and public hearing before the City Council voted on the Ordinance, the district court made clear that the July 26 Order would be satisfied if the

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[10] Consultants retained by the City had drafted the Affordable Housing Ordinance, based upon the terms of the Consent Decree and the Long Term Plan Order (Pet. App. 11a).

[11] All fines would be paid into the Treasury of the United States and would not be refundable (Pet. App. 162j).

City Council passed a resolution committing the City to enact the Ordinance after state law requirements had been met (*id.* at 12a, 159i). All petitioners had notice of the court's July 26 Order and its July 28 letter (*id.* at 18a).[12]

On August 1, by a vote of four to three, the City Council defeated a resolution declaring the City's intent to adopt the Affordable Housing Ordinance. Petitioners, City Council members Spallone, Longo, Fagan, and Chema, voted against the resolution (Pet. App. 12a, 134h).[13] The district court therefore held show cause hearings on August 2 and 4 (*id.* at 115h-158h, 75g-99g). Finding that their refusal to comply with the Consent Decree was "but the latest of a series of contempts" (*id.* at 130h), the district court adjudged the City and the four Council members in civil contempt and imposed sanctions in accordance with the July 26 Order.[14]

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[12] Before entering the July 26 Order, the district court had considered but rejected a proposal to create an "Affordable Housing Commission" to take over the City Council's powers and responsibilities under the court's various remedial orders. The City, speaking as usual on behalf of the City Council, opposed creation of the Commission on the ground that it would have divested the Council of its "core legislative as well as executive functions" (Pet. App. 11a; City of Yonkers Comments With Regard To The Proposed Yonkers Affordable Commission 2 (July 25, 1988)). The United States also opposed the proposal, arguing that the City itself should be required to comply with its obligations and be held accountable for its failure to do so. See Comments of the United States 4-6 (July 22, 1988).

[13] At its August 1 meeting, the City Council scheduled for August 15 a public hearing on the Affordable Housing Ordinance, as required by state law. Following the August 15 hearing, the City Council again rejected the Ordinance by vote of four to three. Pet. App. 13a, 16a-17a.

[14] In response to the Council members' contentions that they had an inadequate time to prepare for the hearing, the court allowed each of them until August 5 to request an evidentiary hearing, a hearing that

4. On August 9, the court of appeals stayed the contempt sanctions pending appeals by the City and the individual Council members (Pet. App. 68d-71e). On August 26, the court of appeals affirmed the adjudications of contempt against both the City and the Council members, but limited the fines against the City so that they would not exceed $1 million per day (Pet. App. 1a-35a). The court of appeals made clear that "[f]or purposes of taking official governmental action, the City of Yonkers is the City Council and vice versa" (*id.* at 30a), and concluded that neither the City nor the Council members could escape responsibility for their refusal to comply with the Consent Decree that the City Council itself had approved (*id.* at 28a, 30a-31a).

5. On September 1, this Court stayed the sanctions against the Council members pending timely filing and disposition of petitions for writs of certiorari, but denied the City's motion for a stay. *Spallone* v. *United States,* Nos. A-172, A-173, A-174, and A-175 (Sept. 1, 1988) (Pet. App. 57c).[15] On September 9, with the City's contempt sanctions approaching a fine of $1 million per day, the City Council finally enacted the Affordable Housing Ordinance (Pet. App. 36b, 203o-205o).[16]

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would be held on August 8. The court ordered that all fines paid by the Council members would be held by the Clerk of the District Court until August 12, pending such a hearing. None of the Council members requested a hearing. Pet. App. 155h-156h.

[15] Justice Marshall, joined by Justice Brennan, dissented from the Court's stay of the sanctions against the Council members (Pet. App. 57c-67c).

[16] The City paid a total of approximately $820,000 in contempt fines. The Council member petitioners each paid $3,500 in such fines. Pet. App. 190n-200n.

ARGUMENT

The City of Yonkers, having been held liable for intentionally maintaining racially segregated public and subsidized housing, voluntarily agreed to undertake steps to remedy those substantial violations of the Equal Protection Clause and the Fair Housing Act. That commitment, specifically approved by the Yonkers City Council, was embodied in the Consent Decree entered by the district court after all parties, including the City of Yonkers, agreed to the terms. Reminiscent of the "fingerpointing" the Court saw earlier in this litigation between the City of Yonkers and the Yonkers Board of Education over the City's segregated schools,[17] the City of Yonkers here blames the Council for the protracted and wilful defiance of the federal court's lawful orders, while the individual Council members claim the privilege to renege on the commitment that the City of Yonkers and the Yonkers City Council previously gave to the court.

Both the district court and the court of appeals refused to recognize such a vacuum of governmental responsibility in the face of authoritative federal court orders designed to remedy racial discrimination in housing. The district court therefore imposed, and the court of appeals upheld, civil contempt sanctions to coerce the compliance that had long been overdue. That compliance is finally underway, the civil contempt sanctions have ended, and this litigation should not be unduly prolonged. The decisions below are correct. They do not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

1. Contrary to petitioners' sweeping suggestions (*e.g.*, 88-854 Pet. 14; 88-856 Pet. 7; 88-870 Pet. 10), this case does not present the question whether the district court

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[17] See U.S. Br. in Opp. 7-8, *Yonkers Bd. of Educ.* v. *United States*, Nos. 87-1632 and 87-1686.

could have issued or enforced an order requiring the City Council to enact legislation absent the Council's consent. The court imposed the contempt sanctions here only to compel compliance with the Consent Decree that the City Council had approved. The district court's order of July 26 simply required the City Council to honor a commitment it had already voluntarily undertaken; the narrow question presented is thus whether the district court properly exercised its power to enforce compliance with that order.[18]

Despite the City Council's express endorsement of the Consent Decree, the Council member petitioners contend (88-854 Pet. 15-21; 88-856 Pet. 11-17; 88-870 Pet. 10-16) that the doctrine of legislative immunity absolves them from any obligation to comply with the district court's orders and shields them from sanctions for their decision to flout the Council's commitment to the court. In support of this broad proposition, petitioners rely principally on this Court's decisions holding state and regional legislators immune from liability in private actions brought under 42 U.S.C. 1983 for acts taken in their legislative capacities. *E.g., Supreme Court of Virginia* v. *Consumers Union,* 446 U.S. 719 (1980); *Lake Country Estates, Inc.* v. *Tahoe*

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[18] Indeed, throughout the remedial process, the district court gave the City and City Council every opportunity to design the Long Term Plan itself. Under the Housing Remedy Order, the City was to submit a proposed plan; the City refused to do so. Under the Consent Decree, the City was to continue negotiations to resolve certain subsidiary issues relating to the Long Term Plan; the City refused to do so. Finally, the Long Term Plan Order entered by the district court was based upon a draft prepared by the City and was revised after the City's comments in order to accommodate most of its objections. Under such circumstances, petitioners' suggestions (*e.g.*, 88-854 Pet. 9-12) that the district court's orders were an excessive use of judicial power are groundless.

Regional Planning Agency, 440 U.S. 391 (1979); *Tenney* v. *Brandhove*, 341 U.S. 367 (1951). As the court of appeals properly concluded, however, those decisions do not relieve the Council members of their duty to comply "with a consent judgment to which their city has agreed and which had been approved by their legislative body" (Pet. App. 28a). Since the context of the contempt proceedings here is thus far removed from the circumstances in which this Court has upheld claims of legislative immunity, application of that doctrine to insulate petitioners' actions is unwarranted.[19]

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[19] In *Tenney* v. *Brandhove*, 341 U.S. 367, 379 (1951), for example, the Court held "only that [where] the individual defendants and the legislative committee were acting in a field where legislators traditionally have power to act, * * * [42 U.S.C. 1983] does not create civil liability for such conduct."

Petitioners Spallone and Chema (88-854 Pet. 15; 88-856 Pet. 8) mistakenly suggest that the court of appeals' decision conflicts with those decisions holding that the doctrine of legislative immunity applies to local legislators. Although this Court has not resolved the question, *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U.S. 391, 404 n.26 (1979), the courts of appeals have agreed that local legislators are immune from private actions brought under 42 U.S.C. 1983 that challenge their legislative decisions. See *Aitchison* v. *Raffiani*, 708 F.2d 96, 98-100 (3d Cir. 1983); *Reed* v. *Village of Shorewood*, 704 F.2d 943, 952-953 (7th Cir. 1983); *Espanola Way Corp.* v. *Meyerson*, 690 F.2d 827, 829 (11th Cir. 1982), cert. denied, 460 U.S. 1039 (1983); *Kuzinich* v. *County of Santa Clara*, 689 F.2d 1345, 1349-1350 (9th Cir. 1982); *Hernandez* v. *City of Lafayette*, 643 F.2d 1188, 1193-1194 (5th Cir. 1981), cert. denied, 455 U.S. 907 (1982); *Bruce* v. *Riddle*, 631 F.2d 272, 274-279 (4th Cir. 1980); *Gorman Towers, Inc.* v. *Bogoslavsky*, 626 F.2d 607, 611-614 (8th Cir. 1980). The court of appeals here assumed the correctness of those decisions (Pet. App. 25a), but recognized that this case presented a different question, namely, "whether * * * an order [requiring the enactment of legislation] may be entered and enforced by contempt sanctions after a city has agreed to entry of a consent judgment committing itself to enact implementing ordinances and a city's

This Court has made clear that "[t]he purpose of [legislative] immunity is to insure that the legislative function may be performed independently without fear of outside interference." *Supreme Court of Virginia* v. *Consumers Union*, 446 U.S. at 731; see *United States* v. *Gillock*, 445 U.S. 360, 369-373 (1980). That purpose is not implicated where, as here, the City Council had already voluntarily approved the Consent Decree. In that Decree, the City Council had agreed to enact legislation needed to implement the Long Term Plan. The district court's July 26 Order and the contempt sanctions that followed sought only to require the recalcitrant City and the Council members to honor that commitment. As this Court has emphasized, "all individuals, whatever their position in government, are subject to federal law." *Butz* v. *Economou*, 438 U.S. 478, 506 (1978); see *Cooper* v. *Aaron*, 358 U.S. 1, 17 (1958). The City Council independently exercised its legislative function on January 27, 1988, when it specifically approved the Consent Decree. The district court did not interfere with that legislative decision by subsequently ordering the Council to comply with the Decree when it failed to do so voluntarily.

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legislative body has voted in favor of such a consent decree" (*id.* at 27a); see also *id.* at 66c (Marshall, J., dissenting from grant of stay). Accordingly, this case is not the proper vehicle for addressing the issue left unresolved in *Lake Country Estates*—an issue that has not divided the courts of appeals—or broader issues of the proper scope of legislative immunity from actions for injunctive relief. See *Supreme Court of Virginia* v. *Consumers Union*, 446 U.S. 719, 731-734 (1980); *Griffin* v. *County School Bd.*, 377 U.S. 218, 233 (1964) ("[T]he District Court may, if necessary to prevent further racial discrimination, require [county legislators] to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system * * *.").

Moreover, the Court "has generally been quite sparing in its recognition of claims to absolute official immunity * * * [and] careful not to extend the scope of the protection further than its purposes require." *Forrester* v. *White*, No. 86-761 (Jan. 12, 1988), slip op. 5. The Court has thus hesitated to apply the doctrine of absolute immunity beyond the confines of *Tenney*, namely, "a civil action brought by a private plaintiff to vindicate private rights." *United States* v. *Gillock*, 445 U.S. at 372.[20] Here, in an action by the United States to vindicate the public interest in eradicating discrimination, the district court imposed contempt sanctions only to coerce compliance with its orders, not to preserve private rights. Any intrusion on the City Council's legislative process surely is minimal when the Council has already agreed to take the action required by the court. Moreover, the compelling public interest in the enforcement of federal court orders to remedy racial discrimination certainly outweighs any slight interference with the routine workings of the Council. See *United States* v. *Nixon*, 418 U.S. 683, 707, 708 (1974) (claims of absolute immunity and privilege must be balanced against "the role of the courts under Art. III" and "must be considered in light of our historic commitment to the rule of law"); *United States* v. *United Mine Workers*, 330 U.S. 258, 303 (1947) ("The interests of orderly government demand that respect and compliance be given to orders issued by courts * * *.").

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[20] For example, "the judicially fashioned doctrine of official immunity does not reach 'so far as to immunize criminal conduct proscribed by an Act of Congress * * *'." *O'Shea* v. *Littleton*, 414 U.S. 488, 503 (1974) (quoting *Gravel* v. *United States*, 408 U.S. 606, 627 (1972)).

At bottom, the Council member petitioners claim a privilege, under the guise of legislative immunity, to choose whether to comply with a federal court order that the City Council itself had earlier approved. This claim far exceeds the bounds of the doctrine of legislative immunity recognized by this Court, a doctrine that seeks to promote independent and effective decisionmaking by legislators. That rationale for immunity cannot properly be extended to allow open defiance of a federal court decree, where the legislature has already consented to the entry of that decree as an appropriate remedy for discrimination.[21]

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[21] Petitioners Spallone and Chema also contend (88-854 Pet. 18-21; 88-856 Pet. 20-23) that they are not bound by the Consent Decree because they voted against it. As officers of the City of Yonkers (see N.Y. Pub. Off. Law § 2 (McKinney 1952)), individual Council members are bound by the Consent Decree, whether they personally agreed to it or not. Fed. R. Civ. P. 65(d); see *Regal Knitwear Co.* v. *NLRB*, 324 U.S. 9, 13-14 (1945). As the court of appeals stated, if a Council member is unwilling to abide by the decree, "his option is to decline to serve on the body that is bound, not to act in defiant disregard of the commitments and the federal court judgment that memorializes them" (Pet. App. 28a).

The Council member petitioners, not joined by the City, attack the Consent Decree itself as the source of their obligation to adhere to the district court's orders. Petitioners did not raise those arguments before the court of appeals, and they have therefore not preserved those issues for review. *E.g., United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). In any event, each of these belately raised points is without merit and calls for no further review.

Contrary to the contentions of petitioners Chema, Longo, and Fagan (88-856 Pet. 4, 23-25; 88-870 Pet. 13), nothing in the Affordable Housing Ordinance contradicts the Consent Decree's proviso requiring only zoning changes that "are not substantially inconsistent with the character of the area" (Pet. App. 184*l*). Indeed, Article V of the Ordinance expressly requires that "the provisions of the underlying

zoning * * * [and] the impact of development on surrounding land uses and neighborhoods" be taken into account before allowing "[d]epartures from [existing] zoning regulations" (Pet. App. 229r).

Citing *Yonkers Racing Corp.* v. *City of Yonkers*, 858 F.2d 855 (2d Cir. 1988) (88-856 Pet. App. 1k-43k), petition for cert. pending, No. 88-1029, petitioner Spallone contends that "changed circumstances questioning the integrity of the Consent Decree and the propriety of the proposed legislation" justified his refusal to comply with the Decree (88-854 Pet. 21-22). *Yonkers Racing Corp.* involved challenges by two property owners (Yonkers Racing Corp. and St. Joseph's Seminary and College) to the City's condemnation of their land for use as public housing sites under the Consent Decree. After examining the circumstances surrounding the adoption of the Decree, the court of appeals upheld the condemnation of the site owned by Yonkers Racing (88-856 Pet. App. 20k-26k, 36k). Turning to the Seminary's site, however, the court of appeals remanded for further factfinding on the Seminary's First Amendment claims (*id.* at 26k-36k). The court of appeals neither questioned the integrity of the Consent Decree nor addressed the propriety of the proposed legislation at issue here. On the contrary, the court of appeals commended "[t]he patience exhibited by the district court under enormously trying circumstances" and urged the implementation of the Housing Remedy Order "as quickly, and hopefully as smoothly, as possible" (*id.* at 36k). Petitioner Spallone's contention is therefore baseless.

Finally, petitioner Chema (88-856 Pet. 20-22) argues that the Consent Decree may not bind the City and the City Council because the City agreed to it only after the court threatened to impose sanctions. That claim is simply wrong. In January 1988, when the City Council approved the Consent Decree, the City had been in default of its obligations under the Housing Remedy Order for more than a year and a half. The district court did indeed threaten to impose contempt sanctions on the City, not for its failure to enter into a consent decree, but only for its continued refusal to comply with the Housing Remedy Order. See 88-856 Pet. App. 6k, 8m-17m. The district court's threat to impose sanctions for the City's continued defiance could only be expected. Rather than undermining the validity of the Consent Decree ultimately approved, as petitioner Chema would suppose, the need for such threats simply highlights the longevity and extent of the City's contumacious behavior and the ultimate necessity for the sanctions at issue here.

2. Petitioners Spallone and Chema contend (88-854 Pet. 21; 88-856 Pet. 9-11) that the district court erred in imposing civil contempt sanctions to require them to comply with the Consent Decree. In their view, the district court should have either enacted the legislation itself or appointed a commission to do so.[22] A federal court has "inherent power to force compliance with [its] lawful orders through civil contempt." *Shillitani* v. *United States*, 384 U.S. 364, 370 (1966); see *Hutto* v. *Finney*, 437 U.S. 678, 691 (1978) ("a financial penalty may be the most effective means of insuring compliance"). While having alternative means of enforcement (see, *e.g.*, Fed. R. Civ. p. 70), a district court may exercise discretion in determining which sanctions will best "bring[] about the result desired." *United States* v. *United Mine Workers*, 330 U.S. at 304; cf. *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) (courts have broad discretion in designing remedies for constitutional violations).

Moreover, as the court of appeals acknowledged (Pet. App. 20a-21a), in imposing contempt sanctions a court

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[22] This argument contradicts the position the City Council had taken before the district court. In opposing the proposed commission, the City, speaking on behalf of the City Council, stated:

> [T]he City Council wishes to convey its serious concerns regarding a proposal which would, in substance and effect, divest the Council of specific state law powers, including core legislative as well as executive functions. * * * As there is little doubt that the City Council would lack the power to delegate those functions to a Commission which is not popularly elected, it is therefore not in a position to consent to such a proposal.

City of Yonkers Comments With Regard To The Proposed Yonkers Affordable Commission 2 (July 25, 1988). Of course, enactment of the legislation by the court, as urged by the City in the district court and by the Council members here, would also have "divest[ed] the Council of specific state law powers."

must use " '[t]he least possible power adequate to the end proposed.' " *Shillitani* v. *United States*, 384 U.S. at 371 (citations omitted).[23] Here, the "end proposed" was the City Council's enactment of legislation, a step the City had expressly agreed to in the Consent Decree. Under the circumstances, either the court's enactment of the legislation itself, or its appointment of a commission to carry out the City Council's responsibilities under the Decree, would have been a greater, not a lesser, exercise of judicial power. See Pet. App. 64c (Marshall, J., dissenting from grant of stay) ("Surely it is both less disruptive and more effective to order compliance * * * than to usurp completely the Council's legislative authority and enact the legislation directly."). And enactment by the court or by an independent commission would not have achieved the essential goal of forcing the City to "recognize its obligation to conform to the laws of the land" by complying with the court's order (Pet. App. 121h). Accordingly, the district court did not abuse its discretion in imposing civil contempt sanctions.

3. Petitioner Chema contends (88-856 Pet. 17-20) that the district court violated his First Amendment right to free speech in ordering him to vote for the legislation, which the Council had earlier approved, and sanctioning him for his refusal to do so. No decision of this Court ex-

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[23] In *Shillitani*, for example, this limitation required the district court to consider civil contempt before criminal contempt (384 U.S. at 371 n.9), and allowed the court to imprison the contemnors, who had refused to testify before the grand jury, only for the life of that grand jury (*id.* at 371-372). That caveat did not limit the court's authority in the first instance to select civil contempt as the proper remedy to coerce compliance with its orders (*id.* at 370).

amining the individual rights of federal or state legislators has considered as protected speech a legislator's act of voting in his official capacity. Rather, the Court has looked to other constitutional principles in resolving individual legislators' challenges to constraints on their activities. See, *e.g.*, *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U.S. at 402-405 (doctrine of legislative immunity); *Gravel* v. *United States*, 408 U.S. 606 (1972) (Speech or Debate Clause); *Tenney* v. *Brandhove*, 341 U.S. 367 (1951) (Speech or Debate Clause and doctrine of legislative immunity); *Kilbourn* v. *Thompson*, 103 U.S. 168 (1880) (separation of powers principle). To the extent that the First Amendment could even apply to a legislator's act of voting in his official capacity, petitioner Chema could not claim such protection here, where the legislative body to which he belongs, the City Council, had already committed itself to enact the legislation under the terms of the Consent Decree.[24] As the court of appeals recognized, whatever freedom individual Council members may have to express their views, that freedom "does not permit them to take action in violation of [the] law" (Pet. App. 28a). If petitioner Chema could not reconcile his obligation as a city official with his individual views, his recourse was to resign, not to defy the law.

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[24] Only two federal court decisions have been found suggesting that the First Amendment has any application to a legislator's act of voting. In *Wrzeski* v. *City of Madison*, 558 F. Supp. 664 (W.D. Wis. 1983), the district court granted a preliminary injunction against enforcement of a city council ordinance requiring each member to vote "aye" or "no" on every resolution (or face censure or fines). In concluding that the plaintiff council member had "a reasonable likelihood of success on the merits of her free speech claim," the court emphasized that under the council's procedures, a vote of "no" was functionally indistinguishable from an abstention, and thus no discernible purpose was served by requiring a "no" vote instead of an abstention (*id.* at

4. Petitioner Chema also asserts (88-856 Pet. 25-26) that the district court violated the Due Process Clause in holding him in contempt. The district court's July 26 Order, as modified by the July 28 letter, clearly explained Chema's duty to honor the commitment to enact legislation as required by the Consent Decree, notified Chema that the court would require him to show cause why he should not be held in contempt should he refuse to honor that commitment, and set forth the contempt sanctions to be imposed. See Pet. App. 160j-163j, 159i. At the August 2 hearing, Chema admitted to the district court that he had received notice of the July 26 Order and that he had voted against the legislation (*id.* at 157h). Thus, there was no need for the government to prove those stipulated facts, and the district court needed no additional facts in order to find Chema in contempt. See *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949). Chema also ap-

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668-669). We do not agree with the *Wrzeski* rationale, but in any event the present case is clearly different: a "no" vote (and similarly, an abstention) by a Council member constitutes official defiance of a federal court order based on the Council's own consent to the entry of a decree. Thus the purpose of subjecting a "no" vote to the sanction of contempt is manifest.

In *Clarke* v. *United States*, No. 88-3190 (D.D.C. Dec. 13, 1988), appeal pending, No. 88-5439 (D.C. Cir.), the district court held that the "Armstrong Amendment" (Tit. I, § 145 of the District of Columbia Appropriations Act, 1989, Pub. L. No. 100-462, 102 Stat. 2269), which conditioned the appropriation of funds to the District of Columbia on the District of Columbia City Council's modification of its law, placed "an unjustified burden on the first amendment rights" of the City Council members (slip op. 18). We disagree strongly with this opinion, and are in the process of appealing from the judgment. But the case, once again, is very different; indeed, the district court in *Clarke* itself distinguished the present case on the basis of the "compelling and public interest in obtaining compliance with federal court orders" (slip op. 9-10), as well as the existence of "the Council's own prior agreement to a consent decree" (*id.* at 10. n.6).

peared with his attorney at the August 2 show cause hearing and the district court gave him the opportunity to request an additional evidentiary hearing (Pet. App. 156h-157h); Chema made no such request (*id.* at 19a).[25] Accordingly, the court of appeals correctly concluded (*id.* at 17a-19a) that the district court's procedures in holding Chema in contempt were consistent with the Due Process Clause.

5. Petitioner City of Yonkers contends (88-855 Pet. 9-13) that the district court erred in imposing civil contempt sanctions against the City to coerce its compliance with the court's orders since only the City Council had the power to enact the legislation. The district court and the court of appeals correctly rejected this argument, which neither law nor common sense supports. Like all municipal corporations, the City of Yonkers functions through its governing bodies, and the official actions of the governing bodies constitute actions of the City. See *Pembaur* v. *City of Cincinnati*, 475 U.S. 469, 481 (1986).[26] Indeed, the responsibility of any corporation for the actions of its governing body is a fundamental tenet of our jurisprudence. Such entities are not exempt from legal accountability because they can act only through their representatives.

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[25] Despite Chema's blanket assertion, such a hearing would not have been "a mockery of justice" (88-856 Pet. 26). The Council members' checks in payment of their fines were to be held by the Clerk of the District Court until August 12 (Pet. App. 157h). Thus, had Chema been able to show cause at any later hearing why he should not have been held in contempt, the adjudication of contempt could have been vacated and his money returned.

[26] Furthermore, the court of appeals found that, as of the time of oral argument before that court, the City had not done all it could to obtain compliance with the district court's orders (Pet. App. 29a).

Moreover, the record belies the City's contention (88-855 Pet. 11) that it was unable to comply with the court's orders. The City Council did enact the legislation when the coercive effect of the fines against the City *alone* (that is, while the imposition of fines against the Council members had been stayed by this Court) became too strong to withstand. In short, the contempt adjudication against the City accomplished the limited goal the district court intended, by making continued refusals to comply with the court's orders an unacceptably costly course of action for the City to follow.

6. Finally, the City contends (88-855 Pet. 13-22) that the district court's imposition of escalating fines for the City's civil contempt violates the Excessive Fines Clause of the Eighth Amendment. This Court has stated that the Eighth Amendment was designed to apply to the "criminal-law function of government," *Ingraham* v. *Wright*, 430 U.S. 651, 664 (1977), and has ruled that the Amendment does not prohibit "the exercise of the traditional remedy of contempt to secure compliance [with court orders]," *Uphaus* v. *Wyman*, 360 U.S. 72, 82 (1959) (coercive imprisonment did not violate the Cruel and Unusual Punishment Clause). Although the Court has granted certiorari to consider whether the Excessive Fines Clause applies to awards of punitive damages in civil cases, *Browning-Ferris Indus.* v. *Kelco Disposal, Inc.*, No. 88-556 (Dec. 5, 1988), such an extension of the Eighth Amendment would not reach civil contempt sanctions. Unlike punitive damage awards, the City's contempt fines were imposed not to punish, but, as in *Uphaus*, to coerce compliance with the court's orders (Pet. App. 32a-34a). The City thus could avoid its burden at any time simply by complying. Indeed, the City did comply without having the fines reach the outer limit of $1 million per day.[27]

[27] Nor is there any objective indication that the imposition of allegedly burdensome civil contempt sanctions is an important public

In any event, even were the Excessive Fines Clause applied here, the City's payment of roughly $820,000 in contempt fines would fall within constitutional bounds. The Eighth Amendment requires that criminal penalties be proportionate to the crime committed; and in determining proportionality, the sentencing court considers the gravity of the offense and the harshness of the penalty, and compares sentences imposed in cases in the same and other jurisdictions. *Solem* v. *Helm*, 463 U.S. 277, 284-292 (1983).[28] And in reviewing sentences, the appellate court must give deference to the discretion of the trial court. *Id.* at 290. Such standards are similar to those governing the propriety of civil contempt sanctions. See *United States* v. *United Mine Workers*, 330 U.S. at 304 (in exercising its discretion, district court "must * * * consider the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired" (footnote omitted)).

The court of appeals here measured the fines the City potentially faced against the standards outlined above, taking into account the level of fines imposed in other cases,[29] the City's annual budget of $337 million, and the

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issue that merits this Court's attention. None of the public policy issues surrounding the controversy over punitive damages applies in the context of civil contempt sanctions. See *Bankers Life & Casualty Co.* v. *Crenshaw*, No. 85-1765 (May 16, 1988), slip op. 7-8; *Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813, 828-829 (1986).

[28] *Solem* applied the Cruel and Unusual Punishment Clause, but held that the "Eighth Amendment imposes 'parallel limitations' on bail, fines, and other punishments * * *." 463 U.S. at 289 (citation and internal quotations omitted). Thus, the standards set forth in *Solem* would appear to apply to the Excessive Fines Clause.

[29] The court of appeals observed that this Court, in *United States* v. *United Mine Workers*, 330 U.S. 258, 305 (1947), "selected as an ap-

City's willingness to refund nearly $30 million in federal funds in order to avoid its obligations under another part of the Consent Decree. The court of appeals concluded that the fines imposed by the district court were necessary to compel compliance and excessive only to the extent that they would continue to double beyond $1 million per day. Pet. App. 33a-34a. Accordingly, the court of appeals correctly held that the imposition of escalating fines for the City's civil contempt (which actually reached $820,000) was not excessive. That holding does not warrant further review by this Court and the petition should not be held pending the resolution of *Browning-Ferris Indus.*

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1989

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propriate sanction a coercive fine of $2,800,000 (in 1947 dollars) to be imposed upon a union if it should fail to comply with a district court order within five days" (Pet. App. 33a).

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IN THE

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OCTOBER TERM, 1988

CITY OF YONKERS,
Petitioner,
v.
UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR THE CITY OF YONKERS

In its petition, the City explained that it was filing a petition in this case to protect its interests in the event the Court should grant the petitions of the individual Council members, who had received a stay of their contempt sanctions by this Court on September 1, 1988. *Spallone* v. *United States*, No. 88-854; *Chema* v. *United States*, No. 88-856 and *Longo et al.* v. *United States*, No. 88-870. The Council members have argued that, for a variety of reasons, they are immune from contempt sanctions in the circumstances of this case. The City takes no position with respect to the Council members' arguments; its interests are plainly distinct from those of the individual petitioners. The City's primary concern

is that a holding by this Court immunizing the Council members on any ground will leave the City to bear the full force of any contempt sanction imposed if individual Council members decide not to comply with future district court orders. Respondents have opposed all petitions, but they do not dispute the City's primary argument, *viz.*, if the Court grants the Council members' petitions, it also should grant the City's petition to ensure that its independent interests are fully considered in this dispute.

1. The City has contended that a contempt sanction against it is inappropriate when the noncompliance is the fault of elected officials acting outside the scope of their authority. The argument follows naturally from the settled principle that a contempt sanction is personal and that the contemnor therefore must "carry the key of his prison in his own pocket." *Maggio* v. *Zeitz*, 333 U.S. 56, 68 (1948) (quoting *Penfield Co.* v. *SEC*, 330 U.S. 585 (1947)). If the contemnor cannot on his own comply with the court's order, then the contempt cannot stand. See *Shillitani* v. *United States*, 384 U.S. 364, 371 (1966).

Respondents completely ignore this contention. Instead, they simply cite this Court's decisions under 42 U.S.C. § 1983, in which cities have been held liable for the constitutional torts committed by officials. But those are cases involving a city's liability to pay compensatory damages for past injuries caused by individual officers; they say nothing about whether a city should be exposed to continuing contempt sanctions when a city official's *ultra vires* acts, in defiance of a court order, leave the city with no mechanism available to undo or halt the official's actions.

Respondents make no attempt to explain how the Section 1983 cases in any way extend to the unusual cir-

cumstances in this case [1] or why the fundamental protection in *Shillitani* is not available to the City.[2] The issue of whether the City can be punished by contempt for a wrong it cannot correct is an important one that this Court has never decided. Moreover, if the Court grants the individual Council members' petitions, it should grant the City's petition so that the interests of the City will, at least, be a factor for the Court to consider in deciding the extent, if any, of the Council members' immunity.

2. With respect to the City's argument that the magnitude of the fines imposed upon it implicate the Eighth Amendment's Excessive Fines Clause, the United States acknowledges (Opp. 23) that the Court has before it the issue of whether the Excessive Fines Clause applies to civil proceedings. *Browning-Ferris* v. *Kelco Disposal,*

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[1] Contrary to respondents' suggestion, this Court's prior interpretations of Section 1983 actually support the City's position that a municipality can be treated as a distinct entity depending upon the nature of the individual city official's conduct. In *City of Newport* v. *Fact Concerts*, 453 U.S. 247 (1981), this Court held that a city cannot be held liable for punitive damages in a situation where punitive damages could rightly be imposed upon individual officials. Section 1983 itself makes clear that, even though a city can be held liable for an official's conduct, it does not follow that the city should be exposed to the same remedy that is appropriate for the official. Thus, the fact that the Council members properly could be held in contempt says nothing about whether the City also should be held in contempt.

[2] The United States draws support (Opp. 23) for its position from the fact that two Council members eventually switched their votes and complied with the court's order. The problem with that logic is that it begs the question of whether the City should have been held in contempt. If, for example, the district court had imposed the contempt punishment upon the Council members' families, that also would have led to an eventual shifting of votes, but it would not justify the imposition of the contempt sanction in the first place. Thus, the fact that two members of the Council eventually stepped in to protect the innocent residents of Yonkers says nothing about the validity of the underlying order against the City.

Inc., cert. granted, No. 88-556 (Dec. 5, 1988). In *Browning-Ferris,* the issue is whether the Clause limits the magnitude of a punitive damages award. While it is true that there are distinctions between ordinary civil contempt and punitive damage situations, this case does not involve a typical civil contempt sanction. As we have already shown, the City could not purge itself of this contempt. Moreover, the district court's use of contempt, when it had equally effective alternative remedies available to it,[3] plainly indicates that the fine in this case was designed to punish the City. Whether such punishment is subject to the Excessive Fines Clause is an issue upon which the Court's disposition in *Browning-Ferris* may shed significant light.[4] Accordingly, at a

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[3] At the August 2 "show cause" hearing, the City urged the district court to respond to the Council members' vote by deeming the legislation to have been duly enacted (as the court had done before). Br. of Defendant-Appellant City of Yonkers, No. 88-6178 (2d Cir.), p. 14. The district court declined to entertain discussion of this alternative.

The United States misleadingly states (Opp. 9 n.12) that "[t]he City, speaking as usual on behalf of the City Council, opposed creation of the Commission . . . ." The government's statement is only true prior to the vote of the City Council. Up to that point there was no reason to assume that the City's and the City Council's interests were divergent. After the City Council voted to defy the district court, then the City's interests were no longer being adequately protected by the City Council and subsequent to that time legal counsel for the City, as a corporate entity, supported use of the Commission as an alternative to imposing sanctions upon the residents of the City. Thus, the remedy of appointing a housing commission was clearly available to the district court as an alternative to the imposition of "bankrupting fines."

[4] Respondents point to the magnitude of the fines and conclude that the sum, which was less than $1 million, could not be "excessive." But that facile conclusion depends upon their assertion that the City is fully responsible for the failure of the Council members to act in compliance with the district court's order. If the City is correct that it was powerless to purge itself of the contempt, then the imposition of *any* monetary penalty arguably is excessive. *Cf.*

minimum the Court should hold the petition pending its decision in *Browning-Ferris.*

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted. Certiorari here is particularly appropriate to protect the interests of petitioner if the Court grants the petitions of the individual Council members in Nos. 88-854, 856, 870. Alternatively, the Court should hold this petition pending its decision in *Browning-Ferris* v. *Kelco Disposal, Inc., cert. granted,* No. 88-556 (Dec. 5, 1988), and then dispose of the petition as appropriate in light of that decision.

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Solem v. *Helm,* 463 U.S. 277, 287 (1983) (" 'Even one day in prison would be a cruel and unusual punishment for the "crime" of having a common cold' ") (quoting *Robinson* v. *California,* 370 U.S. 660, 667 (1962)).